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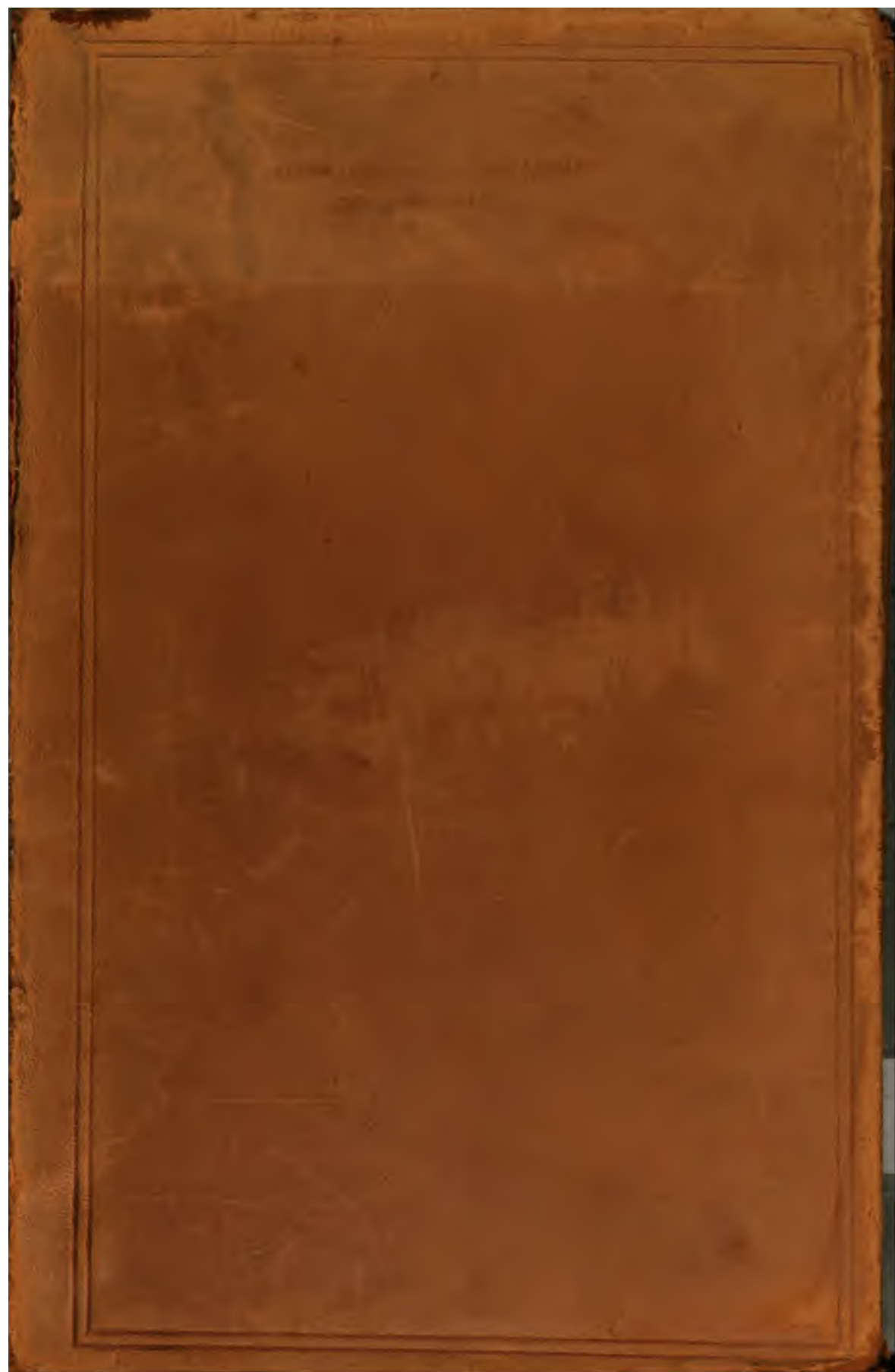
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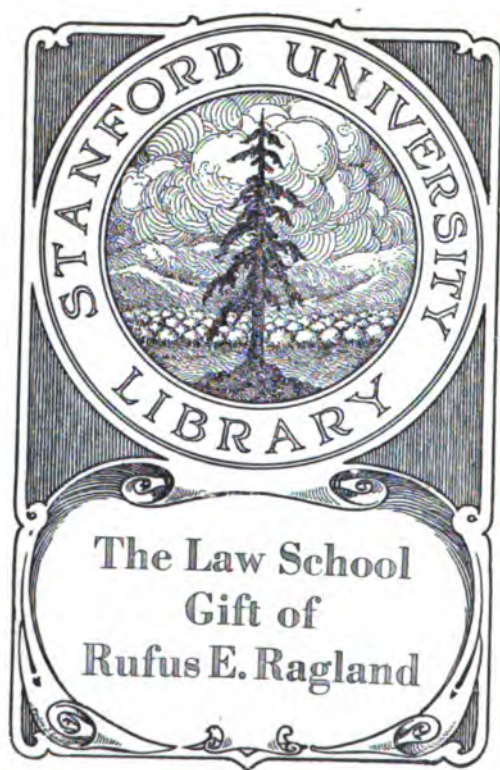
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A TREATISE
ON THE
LAWS OF DESCENT.

BY
ANSON BINGHAM,
AUTHOR OF "TREATISE ON THE LAW OF REAL PROPERTY."

SAN FRANCISCO:
BANCROFT-WHITNEY COMPANY,
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PREFACE.

THE laws of descent were an organic part of the feudal system; and, so far as the general principle of succession is involved, have come down to us unchanged. Important alterations have been made in the order and lines of succession. The course of descent has also been subjected to be entirely defeated by the alienation of the ancestor while alive, and by his testamentary alienation to take effect at and after his death. His estate has also been made liable to the payment of his debts, and the fulfillment of his personal obligations, after the succession of the heir. Otherwise, the heir succeeds the ancestor in the ownership of the estate, precisely as he did under the feudal law, in all the States of this country; that is, his right of succession is based upon the same principle, which regulated succession under purely feudal organizations. It is, therefore, necessary to fully understand the principle and operation of the feudal succession, in order to understand the principle and operation of inheritance at the present day. This work is designed to put the student in possession of a full and familiar knowledge of the feudal law, and of feudal customs in that respect.

Having possessed himself of that general knowledge, the student has then attained a standpoint from which he can command a clear view, and a ready comprehension of the whole of this department of the law, in all its practical operations and incidents.

This work is designed, not only to place the student upon that standpoint, but when he is there, to open up before him, a full and clear view of all the material changes made in the laws of inheritance and in the rights of heirs in the succession, either in England or in this country from the time of the first innovation to the present time.

These changes embrace, among other matters, the subject of the liability of estates which may descend, to the debts and obligations incurred by the ancestor, and the different modes of collecting and enforcing the same; questions of contingent remainders, executory devises and advancements, of marriages and the evidence thereof, and all other questions growing out of, or incidental to, the laws of inheritance as they now exist in the several States of this country.

Two general purposes are sought to be fulfilled in the preparation of this work: *First*, to put the student in possession of all knowledge necessary to a clear and familiar understanding of the origin, operation and principles of the laws of inheritance, as they now exist, including all the incidental questions connected therewith; and, *second*, to place before the practical lawyer the adjudications upon the different points and questions from the reported decisions of England, and of the several States of this country, so fully set forth, explained and reviewed, that he can learn therefrom what is necessary in order to understand the law and its practical application as so established, without having a copy of the decisions themselves before him. One consideration which induced the writer to undertake this work, was the apparent want of an elementary treatise which fully presented this branch of the law, as it has been established and is now in force in this country. Upon many of the points which are continually arising in practice, the lawyer will find but little to aid him in the elementary works generally, while the reported decisions of the several States are rich in their developments thereupon.

For example, such is the case in regard to contingent remainders and executory devises. Elementary writers have generally followed in the footsteps of Fearn, whose classifications and distinctions are too artificial and merely fanciful to be of much, if any, utility in this country. They can furnish but little, if any practical aid, in the solution and adjustment of questions touching contingent interests, as such questions arise under our laws. While our system of

laws touching this class of interests, has rules and principles of its own, of a much more practical character. They are to be found in the reported decisions of the courts of more than twenty different States, and have not heretofore been written up by the text-writers. That class of decisions and its rules and principles are set forth in this work, and will be found to have reduced contingent remainders and executory devises to a few plain and practical questions, within the ready comprehension and understanding of any ordinary mind.

Advancements constitute another branch of the law of descents, which, although initiated in England, has become much more common in this country; and which has received but little attention from the elementary writers, compared to the place it holds in our reported decisions, and the importance it occupies in the adjustment of estates which pass by descent. That class of decisions is fully examined, and the law of advancements thereby shown to be within the reach of classification and system.

In short, this work is designed to accomplish two general purposes: *First*, to educate the student to a better general knowledge of the laws of inheritance than he can find in any other elementary work; and *second*, to place in the hands of the practical lawyer the means of making a good brief, with the least possible labor, upon any of the questions which may arise in his practice under this branch of the law.

ANSON BINGHAM.

ALBANY, *January 1, 1870.*

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TITLE TO LANDS BY DESCENT.

CHAPTER I.

THE ORIGIN, PRINCIPLE AND OPERATION OF DESCENTS, CONSIDERED GENERALLY.

It is the custom of modern times to treat the operation of descent as one of the modes of acquiring title to land, similar in character to the acquisition by purchase. Thus it is stated by Chancellor Kent, that "all the modes of acquiring title to land are reducible to title by descent and by purchase, or according to the better distribution of Mr. Hargrave, into title by act or operation of law, and title by purchase or by the act or agreement of the parties."

4 Kent, 375; See Co. Litt. 237 a, 347 b; 2 Bl. Com. 201.
Smith on Real and Personal Property, 321.

That mode of stating the operation is liable to the objection, that it may mislead the student into the notion that the death of the ancestor begets a title to the lands in the heir; which is only qualifiedly true. The title, which the heir has in the land, neither takes its origin nor gains any strength in the death of the ancestor. The heir merely succeeds to the title or right which the ancestor held at his death. The one is only the successor to the other, to certain contract rights in the land. Consequently, to treat the heir as the successor, as he was once regarded, seems to be more strictly true, and therefore preferable to regarding him as acquiring the title by the death of the ancestor.

It should be borne in mind that an estate of inheritance under the feudal law, existed only in the contract between the lord, for himself and his heirs on the one side, and the vassal, for himself and his heirs on the other. The one con-

tracted that the other might have the possession and occupation of certain lands, usually upon the condition of rendering in return therefor certain rents and services, which the latter agreed to pay and perform. The heirs of each party were expressly named, and regarded, in the eyes of the law, as parties to the contract; and, when the original parties died, the heirs became the real and acting parties of the contract; and so parties continued to succeed each other from one generation to another, so long as there were heirs capable of becoming parties. This contract right of possession of the lands constituted what is known in the law as an estate of inheritance, or an estate in fee; and the succession of one person on the death of another, is what, in more recent times, is said to be the acquisition of title by descent.

The character of this contract, the rights conferred and the obligations imposed upon the heir, are well illustrated in the fact that the heir was not and is not now allowed any choice, whether he will become the party to the contract as the successor of his ancestor, or not. The estate vests in him immediately upon the decease of his ancestor. In that respect, his position differs from an assignee or devisee of an estate, who has the right to elect, whether he will receive the estate or not, and can never have it forced upon him against his will.

Watkins on Descents, 25; Williams on Real Prop. 75; 2 Wash. on Real Prop. 400; 2 Bl. Com. 201; Nicolson v. Wordsworth, 2 Swanst. 365, 372.

This seems to be the only instance known to the common law, where it is possible to make a person a party to a contract against his will. He is not made a party by the death of his ancestor, but is regarded as having been a party before; and is only forced to take an acting part in the contract by the death. There was a time in the early history of the feudal law, when the owner of an estate of inheritance was not allowed to alien the estate without the consent of his heir, on the ground that the heir was so far a party to the contract as to have vested rights therein, of which he

could not be divested by the ancestor; and this right of heirs was made one of the principal obstacles to the alienation of estates of inheritance.

Dalrymple on Feudal Prop. 94, 95, 96; Crabb's History of English Law, 90. 91.

The laws of inheritance or descent, have not in this respect undergone any substantial change in the principle of their operations. The tenant in possession has acquired the right of voluntary alienation to the disherison of the heir. The estate may also be diverted from the heir by involuntary alienation, in favor of the creditors of the ancestor. These contingencies of diversion of the estate from the heir are innovations upon the common law rights of the heir, as those rights formerly existed; and so far, the line of descent, or more properly speaking, the right of succession in the heir, may now be interrupted. But aside from that, there is no change in the principle or operation of the succession.

The estate of inheritance in land in this country, is only a grant or contract on the part of the State, that the grantee and his heirs may possess and enjoy the lands. And on the decease of a person seised and intestate, his heirs succeed to his rights as parties to the contract of the State, as strictly as though the right or power of alienation did not exist. The fact that the party seised may alienate, if he choose, gives to the succession of the heir the appearance of a donation of title from the ancestor, resulting from the election or failure of the latter to make other disposition of the estate. Hence the idea has originated, that the succession of the heir is an acquisition of title from the ancestor, instead of a right secured to him by the terms and operation of the contract.

CHAPTER II.

WHAT RIGHTS ARE THE SUBJECT OF DESCENT
CLASSIFICATION INTO CORPOREAL AND INCOR-
POREAL; DISTINCTION BETWEEN THE TWO
CLASSES.

SECTION I.

WHAT RIGHTS ARE THE SUBJECT OF DESCENT GENERALLY CONSIDERED.

SECTION II.

CORPOREAL HEREDITAMENTS; WHAT THEY ARE AND HOW CONSTITUTED. CASES
REVIEWED.

SECTION III.

INCORPOREAL HEREDITAMENTS; WHAT THEY ARE IN ENGLAND; NOT THE SAME
IN THIS COUNTRY. AUTHORITIES EXAMINED.

SECTION I.

WHAT RIGHTS ARE THE SUBJECT OF DESCENT GENERALLY
CONSIDERED.

Every thing in the way of property, which may descend from the ancestor on his decease intestate, to his heir, is called a hereditament. Hereditament is a general term which embraces every thing having the character of property or privilege capable of being inherited. It follows, therefore, that every species of property, or of individual right, that is made descendible, either by the common law or by statute, is a hereditament.

Hereditaments are divided into corporeal and incorporeal. Corporeal hereditaments embrace only estates in land. They are called corporeal, because they exist in that kind of personal prerogative which gives the right of possession to the land. The subject of the right must be palpable and tan-

gible, and the right itself must be one, the character of which authorizes either a general or a limited occupation. As Blackstone expresses the distinction: "Corporeal consist of such as affect the senses; such as may be seen and handled by the body; incorporeal are not the objects of sensation; can neither be seen nor handled, are creatures of the mind and exist only in contemplation.

"Corporeal hereditaments consist wholly of substantial and permanent objects; all which may be comprehended under the general denomination of land only."

2 Bl. Com. 17; see also 3 Kent, 401; 3 Cruise Dig. 1; Smith on Real and Personal Prop. 4.

Corporeal hereditaments were also formerly described as "things that lie in livery," 4 Cruise Dig. 53; incorporeal as those which "lie in grant," Id. 55; because the one could be created only by livery of seisin, while the other could be created by grant.

That mode of expression grew out of the different modes of witnessing the contracts or grants which the law required to create different classes of interests; that is, an estate of inheritance in land could not be created without a grant or contract witnessed and consummated by livery of seisin; in other words, by the delivery of the possession of the land, or by some ceremony accepted in the law as equivalent; while some other inheritable rights could be created by a mere grant or contract executed by the granting party. That distinction has ceased to exist by the disuse of livery of seisin as a necessary ceremony to the making of a contract of grant or lease. The distinction into "things that lie in livery," and "things that lie in grant," is therefore no longer appropriate. The only classification of hereditaments now existing which has any practical application in this country, is, as before stated, that of corporeal and incorporeal. And we shall see by and by, that it is by no means clear, that that classification has any practical utility in distinguishing individual rights as they exist in the several States of this country.

It should be borne in mind, while considering inheritable rights, that there are two distinct things involved in every such right, namely, the matter or subject to be possessed or enjoyed, and the grant or contract which gives the individual the right to possess or enjoy. The classification indicated by the terms "corporeal" and "incorporeal" relates only to the matter or subject of possession or enjoyment; depending, as we have seen, upon whether it is substantial and tangible, or merely ideal and intangible.

It should also be borne in mind, that, at common law, it is only that class of individual rights which subsists in contract that descends to the heir. Goods and chattels and mere choses in action, embracing all that kind of property which an individual may be said to own in the full and absolute sense of ownership, do not descend. That class of interests goes directly to the administrator or executor, and, only through him, to the heirs at law or next of kin. It is the class of contract rights which gives a right in possession, as distinguished from a right in action, whereby the person claiming has the use and profits of something which he does not otherwise own, that passes to his heir upon his decease intestate. And that contract must, by its very terms and legal effect, embrace the heirs as parties who are to possess and enjoy. It is the contract of that peculiar character which constitutes a hereditament. The grant or contract must bestow the right of possession or enjoyment upon the grantee or party of the second part to the contract, and upon his heirs; otherwise, it does not constitute a hereditament. The class of interests embraced within the term hereditaments is made up, in this country, mostly, if not entirely, of such grants of the State, either expressly or impliedly proved, as bestow upon the holder and his heirs the right of possession to some particular parcel of land. The grant or contract of the State constitutes the hereditament; the land is only the subject of the grant.

SECTION II.

CORPOREAL HEREDITAMENTS — WHAT THEY ARE AND HOW CONSTITUTED — CASES REVIEWED.

Corporeal hereditaments are confined to land.

2 Bl. Com. 17; 3 Kent, 401.

It is equally true, that they embrace only an estate in fee in lands, and apply exclusively to that subdivision of estates, according to the common law classification. No other estate in lands is a hereditament, because no other estate descends to heirs. And whoever succeeds to an estate in fee in land, whether that estate be in reversion or remainder, has a corporeal hereditament.

Some of the modern text-writers have placed reversions and remainders in fee in land among the incorporeal hereditaments.

1 Wash. on Real Prop. 11; Williams on Real Prop. 197.

The grounds upon which they assume to take an estate in fee out of the class of corporeal hereditaments and place it with the incorporeal, the moment it is in reversion or remainder, are found in the rule that reversions and remainders could be conveyed by grant, that is, by a mere deed of conveyance without livery of seisin. They are thus within the ancient distinction that they lie in grant, and not in livery; and, therefore, as the text-writers conclude, they must be incorporeal. The case of *Doe v. Cole*, 7 Barn. & Cress. 243, is cited as authority. Now it is true that that case is authority, "that where lands are in possession of a tenant, the reversioner may convey his interest by deed." It is there said that "all lands lie in livery or in grant; and they do not lie in livery where the party intending to convey cannot give immediate possession." The final conclusion of the court is expressed as follows:

"On the short ground, that where the right of possession is in a tenant for years, the right of the landlord is a reversion expectant on the determination of the tenancy, and lies

in grant and not in livery, I am of opinion that the reversion of the lands sought to be recovered passed by the deed."

There is nothing in that case which undertakes to class reversions or remainders as incorporeal hereditaments. That is only the conclusion of others. The fallacy of that conclusion is apparent. Since livery of seisin is abolished, all estates in land pass by deed, or, in the phrase of the old writers, "lie in grant." Are all estates in land, consequently, incorporeal hereditaments? The tenant or owner of an estate in fee has a corporeal hereditament, while no less estate intervenes between his right and immediate possession of the premises. When a tenancy for life or some other estate less than the fee intervenes, it does not change the character of the right which constitutes the estate in fee; it merely interrupts that right, temporarily, as to one mode of its enjoyment, that is, as to the actual occupation of the premises. But it might as well be said that the estate of the reversioner or remainderman had ceased to exist by reason of the interruption, as to say that it had been changed to an incorporeal right during the interval. It is an attempt at classification based upon a distinction in the mode of conveyance which has ceased to exist, and which, when it did exist, was never held to authorize such classification.

There is another class of rights sometimes placed among incorporeal hereditaments, which seems not properly to belong there. It embraces those which, although they bestow upon the owner only the right to use the premises for some particular and limited purpose, are yet corporeal rights within the definition of that term. Examples of this class are abundant. Among them is the pew-holder of a church, who holds the right to himself and his heirs.

The case of *Mussey v. Bulfinch Street Society*, 1 Cush. 148, presents an example of this kind. So also does the case of *Heeny v. St. Peter's Church*, 2 Edw. Ch. 608.

In *Freligh v. Platt*, 5 Cow. 494, the point was made, that the interest of a pew-holder was real estate within the provisions of a certain statute; but it was decided otherwise. It

was said that the grantee of a pew acquires a limited usufructuary right only. It may be truly said of any estate in land, in one sense, that the holder has a usufructuary right only.

The character of this kind of property in land, as distinguished from the general ownership of land, as it is termed in this country, is practically delineated in *Gay v. Baker*, 17 Mass. 435. That case was an action of trespass *quare clausum fregit* by a pew-holder of a church for tearing down his pew.

The plaintiff's right of action was denied upon grounds expressed in the opinion of the court. It was said:

"Now, it must be obvious, we think, that the property of the plaintiff in his pew, although to be treated as real estate, is by no means subject to the same rules and principles as his property in his farm would be. If it were so, the rights of the parish over the meeting-house, could not be exercised on the most urgent occasions, without interfering with the rights of each pew-holder.

"The corporation or parish is the sole owner of the soil on which the meeting-house stands; as also of the building itself; it having been erected pursuant to a vote of the parish, and paid for by a tax on all the parishioners. The pew-holder has an exclusive right to occupy his pew, and to maintain trespass or a writ of entry against any one who disturbs him in his seat. But he does not own the soil over which his pew is built, nor the space above it; for there may be other pews in a gallery above him, whose owners have an equal right with himself.

"The building and the soil being the property of the parish, they may, when necessary, take it down and rebuild upon the same spot; or may alter the form and shape of it, for the purpose of making it more convenient. If in doing this, not wantonly, but for useful purposes, the pews are destroyed, they must provide an indemnity for the pew-holders on just and equitable principles; and if they do this, there can be no just cause of complaint; because, in the very nature of the property in a pew, there is a necessary

condition that it shall be subject to the regulations of the parish for purposes of this sort."

The rights of pew-holders are not limited, however, to their pews. They are allowed to enjoy other rights as incidents thereto, in common with each other. These more general and incidental rights are well stated in *Revere v. Spanell*, 1 Pick. 169.

In that case a creditor of the meeting-house corporation had recovered a judgment against the corporation, and levied his execution on the pulpit. He then brought trespass against the minister for occupying the pulpit while performing the usual services of the church. The court pronounced his levy void and nonsuited him. The grounds of the decision are thus stated in the opinion of the court:

"The meeting-house corporation had sold the pews to individuals. The purchasers must be supposed to take with the pews that which renders them valuable. The sellers can have no right to take away the windows of the meeting-house, or the walls, or the pulpit, or the singers' loft. The proprietors of pews are entitled to various privileges, such as passing through the aisles, being addressed from the pulpit, etc. There is no property in the pulpit distinct from the right of enjoying the house for public worship."

The good sense and propriety of the reasoning, and the justice of the decision founded thereupon, are obvious.

In *Daniel v. Wood*, 1 Pick. 102, it was decided that "the property in a pew in a meeting-house is not an absolute, but a qualified property; it is an exclusive right to occupy a certain part of the meeting-house, for the purpose of attending upon public worship, and for no other purpose, and is necessarily subject to the right in the parish to take down and rebuild the meeting-house, and make such alterations as the good of the society may require. This restriction upon the property of the plaintiff grows out of the nature of the property, and the purposes to which it is applied."

The cases are numerous which recognize the same principle.

See *Wentworth v. First Parish in Canton*, 8 Pick. 344; *Howard v. First Parish in North Bridgewater*, 7 id. 137; In the *Matter of the Brick Presbyterian Church*, 3 Edw. Ch. 155; *Richards v. The North West Protestant Dutch Church*, 32 Barb. 42; *Shaw v. Beveridge*, 3 Hill, 26; *Voorhees v. Presbyterian Church of Amsterdam*, 17 Barb. 109; *Wheaton v. Gates*, 18 N. Y. 404; *M'Nabb v. Pond*, 4 Bradf. 7.

There is some apparent conflict in the authorities, as to whether this class of individual rights in real property should be classed as corporeal or incorporeal. But the differences of opinion have arisen from failing to discriminate between the right of occupying premises for a particular purpose, and the right of occasionally using premises which are occupied by some one else.

For example, the right to occupy premises for a dock, or wharf, would be as clearly corporeal as the right to use them for pasture, or for agricultural purposes generally. But the right to use the dock or wharf belonging to some third person, as an incident to other premises, would fall among the incorporeal rights.

So, the owner of a pew has a different kind of interest from the person who has only the right to sit in the pew. The difference is of the same character as that which exists between the tenant of land and the person who has merely a right of way across it.

A distinction of this kind was recognized in *Bryan v. Whistler*, 8 Barn. & Cress. 288. The subject of that action embraced the question of right to a vault in a parish church. It was said, that the right to the exclusive use of the vault was one for the disturbance of which trespass would lie. But the mere right to use the vault for a sepulcher, would only entitle the party to an action on the case when he was interrupted.

The rights of the holder of a burial lot in a public cemetery are regarded as in the same class with the pew-holder of a church, and are governed by the same rules.

Richards v. The North West Protestant Dutch Ch., 32 Barb. 42

The right to use land as a wharf, as a dock, as a mill site, or for any other particular and limited purpose, is substantially in the same class.

This principle was expressly sanctioned in *Child v. Chappell*, 9 N. Y. 252, and in *Rose v. Bunn*, 21 N. Y. 275.

The case last cited rested upon an exception in a grant of lands, in favor of the grantors, of "grass, herbage, feeding and pasturage." This exception or reservation was held to give the grantors the right to enter and depasture the land. The court called it a servitude or an easement. But it is obvious that such a right does not come within the definition of an easement. True, it is a qualified right, and, to a certain extent, subordinate to the general ownership. That, however, is not enough to make it a servitude or easement. It is more like the grant of a pew in a church, or of the right to use land as a wharf; and resembles an easement no more than does the grant of land to crop with corn or other cultivated crops.

This class of individual interests in land is also placed by some of the text-writers among the rights distinguished as easements. But it will be readily seen that the cases fail to come within the definition of an easement. The rights thus conferred are not a servitude upon one lot of land and a benefit to another lot. There is but one lot of land involved in the rights. The respective rights of the different parties subsist in the same parcel of land, the one party being the general owner and the other limited to particular rights.

There is another reason why they cannot properly be regarded as easements or servitudes, namely, easements or servitudes do not entitle the grantee to the profits of the land.

There are decisions of the courts which deny that such interests in land are easements or servitudes, and which place them among the class of interests known as estates in land. Some of them will be referred to and examined before the close of this section.

There is also an apparent impropriety in placing this class of rights among incorporeal hereditaments. They more

properly belong to the corporeal. They certainly answer to the leading characteristics of that class. They "affect the senses;" can "be seen and handled by the body," and consist "of substantial and permanent objects." They are no more mere "creatures of the mind," no more "exist only in contemplation," than do the rights of the general owner of an estate of inheritance. The man who has a right to the exclusive possession of a pew in a church, to a burial lot in a public cemetery, to the occupation of a lot as a mill site, to dig and work mines, has a tangible interest, just as capable of being seen and handled and just as substantial in its character as he who has the right to cultivate land and enjoy its productions generally. The difference is only in the kind of enjoyment of the land to which each is entitled.

The same is true of the right to take from land some particular crop or production. It constitutes an interest in land which is classed among those interests known as tenements; and when the right is extended by the terms of the grant to the grantee and his heirs, is called a corporeal hereditament.

The decisions of the courts have gone to great lengths in holding this class of interests in lands to be tenements or estates, such as give to the parties owning possessory actions against those who unlawfully disturb their enjoyment.

In *The King v. The Inhabitants of Hollington*, 3 East, 113, the question was as to the settlement of a pauper; and it turned upon the point whether the renting of the pasturage of two cows in a certain large pasture was a tenement. The pauper did not have the exclusive pasture of the lot, and the owner was under no restriction as to the number of cows he kept in it.

The court held it to be a tenement. It was said the question is, "whether or not it be a contract to receive profits out of land? If that be so, it determines this case; for here the cows were the pauper's own, and the contract which was for the pasturage of them, was a contract for the pernaney of the profits of the land by the mouths of the cattle."

A similar principle was held to apply in the *The King v. Watson*, 5 East, 480.

In that case, the borough of Huntington was the owner or proprietor of a large tract of land, which was used as a common of pasture, and stocked by such resident burgesses as chose to exercise the privilege under certain regulations, whereby those who stocked the pasture paid those who did not a certain sum. The question was whether those who thus pastured the common, were tenants subject to be rated or assessed for the support of the poor; and it was decided that they were.

It was said by Lord ELLENBOROUGH, Ch. J., that, "The whole cloud which has been cast over the case arises from a misconception of the nature of the property occupied by these persons. It has been resembled to an incorporeal hereditament; but it is no such thing. The corporation are the owners in fee of the land, and they dole it out annually, according to the custom, to certain of the burgesses; such of them as take it, paying a certain sum to those who do not turn on any stock. Then, when the number of persons who stock it is ascertained, what is there to distinguish them from other tenants in common? Each of them might maintain trespass for an injury done to his occupation in common. It has been decided that a common in gross is a tenement, and it should seem from thence to follow that it is ratable; but without considering that, this case steers clear of all difficulty; for I do not consider this an incorporeal hereditament, but as a corporeal tenement, of which the several burgesses who stock are tenants in common."

The same doctrine has been held in other cases.

See *The King v. The Inhabitants of Darley Abbey*, 14 East, 280; *The King v. The Inhabitants of Whitley*, 1 T. R. 137; *The King v. The Inhabitants of Dersingham*, 7 id. 671; *The King v. The Inhabitants of Hollington*, 3 East, 113.

The case of *Crosby v. Wadsworth*, 6 East, 602, presents an instance of the application of the same principle to a somewhat different state of facts. It was an action of tres-

pass *quare clausum fregit*. The facts were, that the plaintiff had agreed by parol with the defendant for the purchase of a standing crop of mowing grass, then growing in a close of the defendant, for twenty guineas. The plaintiff was to cut the grass and make the hay. There was no memorandum or writing signed by either of the parties, and the defendant retained possession of the lot. The court held, as a general proposition, that one who has contracted with the owner of a close for the purchase of a growing crop of grass thereon, for the purpose of being mown and made into hay by the vendee, has such an exclusive possession of the close, though for a limited purpose, that he may maintain trespass *quare clausum fregit*, against any person entering the close and taking the grass, even with the assent of the owner of the land. They, however, held the contract void, because it was not in writing, and defeated the plaintiff on that ground.

The doctrine of that case, as to the right to maintain trespass, was adopted in *Stewart v. Doughty*, 9 John. 108. So, in *Carter v. Jarvis*, 9 id. 143, it was held, that the assignee and owner of a crop of wheat, growing on a certain lot, could maintain trespass in his own name against the owner of the land, for cutting and carrying away the wheat.

Upon the same principle, the grantee of a right to use land and water to run mills, or any kind of machinery, has such an estate in the land as will enable him to maintain trespass for breaking his close.

See *Van Rensselaer v. Van Rensselaer*, 9 John. 376.

And where the right is secured to the grantee and his heirs, there is a freehold estate of inheritance in that right.

See *Thompson v. Gregory*, 4 John. 81, 83; *Dygert v. Matthews*, 11 Wen. 36; *Gay v. Baker*, 17 Mass. 435; *Daniel v. Wood*, 1 Pick. 102.

In *Wilson v. Smith*, 10 Wen. 324, the court made a distinction between a right to erect a dam across a river, and the right of the party after having erected his dam; holding

the one to be a franchise, an incorporeal right, and the other to be more than a franchise and to be a corporeal right ; and that trespass, and not case, was the proper form of the action in the latter case for a direct and immediate injury to the premises. It was conceded, that trespass would not lie for an injury to an incorporeal hereditament ; but that it was otherwise " when visible, tangible, corporeal property is injured, if the injury be direct and immediate."

The same principle was applied in *The Seneca Road Company v. The Auburn and Rochester R. R. Co.*, 5 Hill, 170.

There is an apparent absurdity in calling the right to a thing incorporeal and the thing itself corporeal. What constitutes property except the right to hold the thing itself ? Upon the same principle, the right to hold the land in fee and the land so held should be regarded differently, the one as incorporeal and the other as corporeal. Those who call an estate in fee incorporeal while it is in reversion or remainder, act upon a similar idea. It is a distinction altogether too refined and subtle to have a place in the law of real property. It certainly had no place in the feudal law.

In *Jackson v. Buel*, 9 John. 298, the right to erect and build a dam on certain land, was held to be such an interest in land as would enable the holder to maintain ejectment.

See *Runnington on Ejectment*, 121.

There is nothing in *Child v. Chappell*, 9 N. Y. 246, at all conflicting with the doctrine of the cases before cited. That was ejectment to recover possession of a strip of land used as a wharf. The defendant owned a lot and a mill thereon, adjacent to the wharf, and claimed to use the wharf for loading and unloading boats for the use of his mill. Such occupancy of the wharf was held not sufficient to make him liable in ejectment. This right to use the wharf was decided to be only an easement, appurtenant to the mill, in common with a similar right in others. It was held that a claim of right to such enjoyment, or the actual enjoyment could not make a party liable to ejectment in any case, because such an

interest in a plaintiff would not enable him to maintain ejectment against an intruder. And the general rule upon the point was stated *per* Denio, J., as follows :

“ I am of opinion that the claim of title, or of some interest in the premises, spoken of in the statute, must be such a claim as that, if it were reduced to possession or enjoyment, it would constitute an actual occupation of the premises, so as to authorize ejectment to be brought on that ground. The wharf, it is true, is tangible property, but the defendant is not in possession of it, and does not claim to own it.”

In *Doe v. Wood*, 2 Barn. & Ald. 724, a grant of free liberty to dig for tin and all other metals, throughout certain lands therein described, and to raise, prepare them for market and dispose of the same, together with the use of all waters and water courses, was held not to amount to a lease, but to be a mere license to dig and search for minerals ; and that the grantee could not maintain ejectment for mines lying within the limits prescribed, but not connected with the workings of the grantee.

The decision itself may have been correct, but the ground assigned for it cannot be defended consistently with the decisions hereinbefore cited. The right to dig and sell metals for one's own use must amount to a demise of the land for that purpose, and should be regarded as a tenement. Certainly it should be so held by courts which decide the right to pasture a cow upon a certain lot to be a tenement ; and, as in one case, the right even to milk a cow for the season, to be likewise a tenement.

See *The King v. The Inhabitants of Darley Abbey*, 14 East, 280.

The true ground of the decision in *Doe v. Wood* was, that the plaintiff had not the exclusive right to dig and sell. He was only a tenant in common in that respect ; and consequently had no right of action for mines which he was not himself working. But his right thus restricted was no less a tenement than though it had excluded the right of others to dig.

It is sometimes difficult to determine the line of distinction between an interest in land which is properly called an estate, and a right which is merely an easement. Both rights originate and exist only by virtue of a grant, which is a contract executed, and bestows upon the party who may, for the time, happen to be the party of the second part thereto, the right to the use of the land for the purpose named in the contract. The distinction, therefore, between the two, is to be decided by the character of the enjoyment which is secured by the contract to the party of the second part. If he thereby acquires the use of the premises for the purpose of a direct profit therefrom, his right constitutes an estate. On the other hand, if his use of the premises is merely a matter of convenience auxiliary to the enjoyment of other lands, and conducive to the profits of the other lands only, it constitutes merely an easement.

This subject is also sometimes complicated by the distinction existing between a lease and a license, which will be treated of in another connection.

But there is no difficulty in determining what constitutes a corporeal hereditament. All the authorities concur in two things: First, there must be a contract executed, known in the law as a grant or lease of land, embracing, as parties thereto, not only the grantee or lessee, but his heirs. Second, the right thus bestowed upon the grantee and his heirs, must be a right to the possession and enjoyment of the land generally, or a right to occupy and enjoy it in some particular way or for some specified purpose. It is the contract right thus vested in the grantee and his heirs, which constitutes a corporeal hereditament. This theory underlies the descent of all estates in land. In this country, such estates originate and exist, for the most part, if not entirely, in grants of land of which the State is the party of the first part. We speak of the land as the thing which descends, and overlook the grant or contract of the State upon which the individual right rests. The result is not changed by the oversight, but it will do no harm if both the party and

the lawyer understand the true theory and its operation, upon which estates of inheritance in land depend.

SECTION III.

INCORPOREAL HEREDITAMENTS ; WHAT THEY ARE IN ENGLAND ;
NOT THE SAME IN THIS COUNTRY ; AUTHORITIES EXAMINED.

Every thing in the way of property that may descend to heirs, other than such rights as are known as estates or tenements in land, is placed among the class of hereditaments which are distinguished as incorporeal.

Blackstone enumerates ten kinds of this class, namely, advowsons, tithes, commons, ways, offices, dignities, franchises, corodies or pensions, annuities and rents.

2 Bl. Com. 21.

Of the kinds thus enumerated, most of them may be dismissed as having no existence in this country. There are here no advowsons, tithes, dignities or corodies, and offices are not hereditary, and not therefore embraced in our laws of descent.

Those which require a notice in this country in connection with the laws of real property are:

1. *Commons*: The right of common may be generally defined as the right which one man has upon the land of another, to feed his cattle, to catch fish, to dig turf or to cut wood and timber. These different rights are consequently usually classified as common of pasture, common of piscary, common of turbary and common of estovers.

8 Cruise Dig. 75.

Common of pasture seems to be most the subject of comment in the books; and is distinguished as appendant, appurtenant, because of vicinage, or in gross.

Litt. § 184; Co. Litt. 121 b, 122 a.

It takes the name "common of pasture" "for that the feeding of beasts in the land wherein the common is to be had belongs to many."

Co. Litt. 122 a.

Common appendant is described by Blackstone as "a right belonging to the owners, or occupiers of arable land to put commonable beasts upon the lord's waste, and upon lands of other persons within the same manor."

2 Bl. Com. 83.

This right was one of the arrangements of the feudal law to regulate the general economy of that feudal institution known as a manor. It was not a right in the tenant, growing out of any express stipulations in his contract with the lord of the manor, but one supplied by the law itself. In other words, it was an implied, not an express right.

Its origin is described by Blackstone as follows. He says, speaking of this right in the tenant: "This is a matter of most universal right; and it was originally permitted, not only for the encouragement of agriculture, but for the necessity of the thing. For, when lords of manors granted out parcels of land to tenants, for services either done, or to be done, these tenants could not plough or manure the land without beasts; these beasts could not be sustained without pasture; and pasture could not be had but in the lord's wastes, and on the uninclosed fallow grounds of themselves and the other tenants. The law, therefore, annexed this right of common, as an inseparable incident to the grant of the lands; and this was the original of common appendant."

2 Bl. Com. 83.

This kind of common of pasture does not exist in this country, for the political institutions here do not permit of the existence of a manor; and even in the assumed existence of manors in some of the colonies, there seems to have been no such thing as a common of pasture appendant. Common of pasture, claimed to exist on what were then called manors, seems to have been of the kind distinguished as common appurtenant, which is a right granted by deed, by a person owning waste or other land, to the tenant or owner of other land, to have the cattle of the latter pasture at certain seasons of the year upon the land of the former.

The case of *Watts v. Coffin*, 11 John. 495, presents a case of what was held to be common appurtenant. There was a deed of conveyance of land in fee, assumed to operate as a lease and made in 1773, in what was then called the Manor of Renselaerwyck. There was in the instrument a covenant for reasonable estovers and common of pasture for all commonable beasts. It was held that the covenant of the grantor did not operate as a grant, but merely as a covenant; and that consequently the right of common, thus specified, constituted no part of the premises granted on which rent was reserved. In other words, the covenant was an executory and not an executed contract. In announcing that conclusion it was said: "The words here made use of, unlike those by which the lands are conveyed, are words of promise and agreement only, as distinguished from words of grant."

11 John. 498, 499.

If the court were right in holding the words to operate as a mere promise or covenant, then clearly there was no right of common created; for no such right could vest by the force of an agreement which operated as a mere promise. It would, with that construction, be only an executory agreement, constituting a mere chose in action, and bestowing no right in possession, but only a right in action.

But the question now under consideration is, whether an interest or right of common of pasture, either appendant or appurtenant, belongs to the class of interests known as incorporeal hereditaments. In more direct language, is it an interest or right which descends to the heir? The obvious answer is, it descends only as a part of the estate in the land to which it is appendant or appurtenant, whenever that is an estate of inheritance. When that is not an estate of inheritance, it does not descend at all. Detached from the estate to which it is annexed, it does not descend, for it ceases to exist. In short, then, whenever it descends, it descends as a part of the corporeal hereditament to which it is attached. Where, then, is the propriety in saying it is an incorporeal hereditament?

Rights of common of that character are sometimes called easements, and have been so held generally.

See *Rowbotham v. Wilson*, 8 Ellis & B. 148; *Thomas v. Marshfield*, 10 Pick. 364; *Livingston v. Ten Broeck*, 16 John. 14, 25.

But they are not strictly within the definition of easements, because the owner of the dominant estate is thus entitled to a share of the products of the servient tenement.

But we are not now examining the subject further than to ascertain whether the class of rights mentioned are, in truth, corporeal hereditaments.

"Common because of vicinage," is where two landholders have adjacent lands unfenced. In such case, if the beasts of the one stray upon the land of the other, it is an excusable trespass. No right of pasture attaches to the land of the one in favor of the other, and either is at liberty to exclude the other by fencing.

See 2 Bl. Com. 33, 34.

As neither party acquires any property or right in the lands of the other, there is no right or property to descend to the heir, and, of course, nothing like a hereditament, either corporeal or incorporeal, in what is called "common because of vicinage."

"Common in gross," is a right not attached to other land, but to a man's person, being granted to him by deed. We have already considered this right, and shown that it has been regarded as a tenement, a tangible interest, and, of course, a corporeal hereditament, when granted to a man and his heirs.

We submit, therefore, that there is strictly no such thing among incorporeal hereditaments as a right of common. When that class of rights descends from the ancestor to the heir, it descends either as an estate or tenement, or as attached to an estate or tenement. It has no independent existence which can be separately considered as a hereditament at all, except when it is a common in gross, when it is corporeal and not incorporeal.

2. Rights of way and other easements of like character are qualified interests in land, and generally classed as incorporeal hereditaments. If they are in gross, that is, attached to the person of the grantee, they are not assignable or devisable, and cannot exist beyond the life of the grantee. If appurtenant to estates of inheritance, they descend along with the estates to which they are attached, and not otherwise. They constitute part of the corporeal hereditaments, and are incapable of existence, or of descent except in such connection. Wherein then is the propriety of classing them as incorporeal hereditaments?

It may be truly said, that none of the class of interests, embraced within the terms "easements" or "servitudes," exist or can exist for a moment, except as incidents of estates in land; and they cannot pass by descent or otherwise, on the one side or on the other, except as they go along with the respective estates to which they are attached, on the one side as a burden and on the other as a benefit. In undertaking to classify them as incorporeal hereditaments, we are only attempting to contemplate them as independent things, which is, to that class of interests, an impossible state of existence. On the one hand, no good can result from it, while on the other, it tends to mislead and confuse not only the student in his efforts to acquire knowledge, but even the mature lawyers who are intrusted with judicial functions, as will appear before we leave the subject.

3. "Rents" are the only other interests enumerated by Blackstone as among incorporeal hereditaments, that require to be noticed in this connection; and we propose to examine the subject here only so far as may be necessary to ascertain whether rents ever can be, in this country, properly placed among the incorporeal hereditaments; and if so, when.

The rent service of the common law is nothing more than the agreement of the lessee to pay the lessor a certain sum periodically, for the use of his land. That agreement attaches to the reversion in the lessor, as an incident of the reversion; and when the reversion in the lessor is an estate

of inheritance, the rent passes by descent along with the estate. The rent separately considered does not pass by descent. The estate alone descends, and there seems to be no propriety in saying that the rent is a hereditament because it descends as an incident of the estate in the land, more than there would be in calling a fixture a hereditament, for the reason that it descends as a part of the estate in the land. It is true, that when the estate in reversion passes by descent or otherwise, from one person to another, the rent thereafter to become due passes along with it. But it is none the less true, that the agreement to pay the rent is merely an executory agreement, and is nothing more nor less than a chose in action. It will hardly be contended that a mere agreement to pay a certain sum periodically or otherwise, although made to the promisee and his heirs, will descend to the heirs, and thus become a hereditament, either corporeal or incorporeal. There is, therefore, no propriety in placing rent service among incorporeal hereditaments, when considered as incident to the reversion.

Different from easements, the agreement to pay rent may be separated from the reversion, by the owner of the reversion conveying his estate in the land to one person and his agreement for rent to another.

See Williams on Real Prop. 270; Litt. §§ 225, 226, 227, 228, 572.

The agreement of the lessee is not thereby destroyed as a personal contract. but it is no longer the rent of the common law.

It is merely the personal agreement of the party who made it, and is entitled to no greater or other consideration, either in the remedies by which it is to be enforced, or in the classification wherein it is to be embraced, than any other mere promise to pay or to do. The conclusion is, therefore, inevitable, that rent service is not an incorporeal hereditament and cannot be made so; for, as incident to the reversion, it descends only as a part of the reversion; while, separated from the reversion, it does not descend at all. A covenant

of the lessee to make repairs on the premises, or to pay the taxes, might just as properly be called an incorporeal hereditament as a covenant to pay rent, while the rent remains an incident of the reversion. Separated from the reversion, it is merely a chose in action. It will not be claimed that a promise to pay or to do, is a hereditament, as a general rule, merely because the promise may, in terms, be to the heirs. Otherwise, every thing would be a hereditament, where the promise or agreement embraced the heirs, in its terms.

As to the other kinds of rents, usually enumerated in the text books, they seem never to have existed in this country.

The case of *Guild v. Rogers*, 8 Barb. 502, 504, is sometimes cited as an instance of a rent-charge. There was, in that case, a lease for years and the ordinary rent-service of the common law. There was, however, an express provision in the contract of lease, that the lessor might distrain for rent in arrear. In July, 1846, and after the statute abolishing distress for rent went into effect, the landlord distrained for the rent in arrear, and claimed that he had a right to do so notwithstanding the statute abolishing distress for rent, on the ground that the contract right to distrain was not affected, and could not be affected by the statute. The court decided that his right to distrain was abolished by statute; that the provision of the contract of lease authorizing distress was a matter of remedy, and subject to the will of the legislature.

The case of *Adams v. Bucklin*, 7 Pick. 121, is another case of rent-service which is sometimes mistaken for rent-charge, evidently through the want of a proper discrimination, or of knowledge, as to what constitutes a rent-charge, and wherein it differs from a rent-service. The case clearly shows, that the rent in question was reserved in what purported to be, and what was regarded an indenture of lease in perpetuity; and the only question litigated, or decided, was, whether certain legislative resolutions had discharged or released the alleged rents.

The case of *Scott v. Lunt's Administrator*, 7 Peters, 596, is of similar character. The case was tried and disposed of by the court upon the assumption that the instrument of conveyance containing the agreement for the alleged rent was a lease, and the rent the ordinary rent from a tenant to his landlord. The rent seems to have been mistaken for a rent-charge, because the alleged lease contained an express provision for distress.

The action was brought against the administrator of the covenantor, as a personal action, to recover damages for the breach of the covenant made by the intestate. It was expressly decided that the plaintiff was the assignee of the reversionary estate, or of the right of re-entry, which had remained in the lessor; and the only question passed upon by the court was, whether the assignment of rent merely "would give the assignee a right to maintain an action for the rent, seeing it is not knit by any privity of right or estate to the premises." The court decided that the assignee of the rent, notwithstanding he was not the assignee of the residuary estate, or of the rights of the lessor, might maintain the action in his own name against the administrator of the covenantor.

In the case of *Van Rensselaer's Executors v. Hayes*, 5 Denio, 477, the executors sought to recover in ejectment for non-payment of rent which had accrued in the lifetime of the testator. They were defeated, on the ground that the reversion did not vest in the executors, but in the devisee.

That was a case arising upon a conveyance in fee, which was assumed by both parties to be a lease in fee in its operation and effect. The decision was made before it was discovered and decided that a conveyance in fee could not operate as a lease in New York, but operated as an assignment, because of the incorporation in the statutes of the State of the substance of the English statute, known as the statute *quia emptores*. The case is here referred to, merely to show that the rent itself did not descend, but passed to the executors, while the only interest which was

supposed to be devisable and descendible, was the proprietary or reversionary estate, assumed to have existed in the original grantor; and that only such rent as accrued after the death of the testator went along with the reversion, as being the rent for the use of the land.

There is but one class of cases to be found in the reported decisions of this country, wherein it is said that a rent-charge, or a rent-seck, exists, and is called a hereditament of itself. And those are cases where the courts have failed to distinguish the one class of rents from the others, and have evidently labored under the impression that all rents were alike, except in name, and were always attended by the relations of landlord and tenant.

The first of the New York cases which has pronounced a rent to be a rent-charge, because the instrument of conveyance left no reversion in the party who made it, is *De Peyster v. Michael*, 6 N. Y. 467. There was no point involved in that case which called for a decision in regard to the rents, or for the expression of any opinion thereon. It is true, that the court declared, as a general proposition, that all rents reserved in deeds of conveyance in fee, made after the act of 1787, concerning tenures, took effect, were either rents-charge or rents-seck, and could not be made rents-service; and they repeated some of the doctrines of the older English books about a rent-charge being descendible and devisable. But they did not undertake to say that those doctrines were law in this country; or that such a thing existed here, or could exist here as a rent-charge, in the English understanding of that term; or that any such interest was here recognized and treated as a hereditament.

The next case deserving notice in this connection, is *Van Rensselaer v. Hays*, 19 N. Y. 68. The same old English doctrines as to a rent-charge being descendible and devisable are again there repeated in an equally general and pointless manner, with ideas evidently even more obscure upon that subject than were exhibited in the case last before cited; for before the opinion closes, the court is gravely discussing the

relations of "the patroon" and his vassals; of a manorial lord and his tenants; contrasting, as they viewed it, the absolute proprietary and commanding rights on the one side, with the comparatively humble and subject positions on the other; and, upon speculations of that character, the judgment of the court is finally made to turn. Whatever was said of a rent-charge was evidently repeated without having in mind any distinct or correct idea of what a rent-charge was, but with the full impression in the minds of the judges, that they were dealing with parties, who held to each other the relation of feudal lord and feudal tenant, and who were subject to the laws applicable to that relation, as those laws existed and were applied in the middle ages.

There are other cases in the New York Reports, of subsequent date, which assume to follow the last cited case. But they add nothing in the way of authority, that a rent can properly be regarded as a hereditament. None of them undertake to discuss any such question. All the questions, assumed to be involved, are disposed of by the court, in each case, as questions between landlord and tenant. It is expressly conceded that the several decisions can be sustained on no other ground.

Van Rensselaer v. Read, 26 N. Y. 576; *Maine v. Greene*, 33 Barb. 448; Same case, 33 id. 136; *Tyler v. Heidorn*, 46 id. 439; *Cruger v. McClaughry*, 51 id. 642.

It is true, the court were equally explicit in deciding that the instruments of conveyance, wherein the rents were reserved, were assignments and not leases; and that the relations of landlord and tenant were not thereby created.

Van Rensselaer v. Dennison, 85 N. Y. 893.

These cases are thus self-involved in an inexplicable conflict with each other and with themselves; and if entitled to consideration as authority upon any point, they certainly cannot be construed as decisions, that either a rent-service or a rent-charge is an incorporeal hereditament.

In *Van Rensselaer v. Hayes*, 19 N. Y. 68, the court relied chiefly upon *Van Rensselaer v. The Executors of Platner*,

2 John. Cases, 17. The conveyance in that case was made in 1774, under the laws of the colony, when the maker of the deed was understood to be one of the lords and proprietors of the manor of Rensselaerwick, where the lands lay. It will not be pretended that rents, due to the lord of a manor from his tenants, are or can be either rents-charge or rents-seck; or, considered apart from the land, that they are hereditaments.

Farley v. Craig, 6 Halst. 262, is, in the character of its facts, similar to the New York cases. The action was ejectment for the non-payment of rent. There had been an indenture made in 1740, whereby the party of the first part, therein mentioned, had conveyed certain lands to the party of the second part and his heirs; and the party of the second part had covenanted to pay a certain yearly rent, with a provision of distress and re-entry, in case of failure to pay. The plaintiff was defeated, upon the ground that there was sufficient personal property upon the premises, subject to distress, to pay the rents in arrear, and that, therefore, he had no right to resort to the remedy of re-entry.

The case differed from the New York cases, only in regard to the provisions of the condition. In this case the condition was "to remove and put out until the said arrears with all the charges thereon be fully satisfied and paid." This was one form of a condition of re-entry in use between landlord and tenant. It was never used in the contracts which created rent-charges. In that class of cases, the condition was that the owner of the rent might "enter into the lands and receive the profits until he shall be satisfied of the arrears."

Jemot v. Cooley, T. Raym. 135, 158.

There is a very great difference between entering to put the occupant of land out, and entering to take the products of the land to pay a debt. It is like the difference between an execution which authorizes the taking of the personal property of a debtor, and an execution which authorizes the one party to take possession of land by putting the occupant out. *Farley v. Craig* was treated by the court as an action of ejectment, wherein the judgment assumed to authorize the plaintiff

iff to take possession of the land by removing the occupant therefrom, which could never be authorized in the case of a rent-charge. The instrument in which the rent was reserved was apparently treated as a lease, and the rent was regarded as a rent due from a tenant to his landlord. The question of inheritance was not made in the case; and there is nothing which can be construed as holding that there was any thing like a rent-charge; or that a rent-charge was a hereditament.

The Pennsylvania cases touching rents-service and rents-charge, do not assume to place either the one or the other among incorporeal hereditaments. The rents are there treated as rents-service, when reserved in conveyances in fee, on the ground that the statute *quia emptores* was not a part of the laws of that State.

Ingersoll v. Sergeant, 1 Whart. 348.

It is evident that in using the term rent-charge, as in some other of the Pennsylvania cases, it was not used in the English sense of that term, but only to designate a rent upon an estate in fee, which was secured by an express provision of distress and re-entry. It was there also called a ground-rent, which is a phrase indicating that the rent is to be paid for the land only; and that the buildings are the tenant's and not the landlord's. That term of distinction is never used, except as applied to leases in fee; and is entirely inapplicable to a rent-charge, as that term is found in the English books.

See *Streater v. Fisher*, 1 Rawle, 155; *Herbaugh v. Zausmyer*, 2 *id.* 159; *Phillip v. Clarkson*, 3 Yeates, 124.

It is evident that there is no case in the reported decisions of this country, which can be properly relied upon as holding that a rent-charge exists here, or ever has existed here, as a hereditament.

There is no case here like *Jemot v. Cooley*, T. Raym. 135, 158, or *Haverhill v. Hare*, Cro. Jac. 510. Those were cases where the owner in fee of land had bor-

rowed money of a stranger to the land, and to secure and make it a safe investment, had entered into an agreement which constituted what was called a rent-charge. The money lender was by contract authorized to enter upon the premises, and take therefrom of personal property thereon, or of the products of the land, enough to pay the annual sum agreed to be paid. It was merely an executory agreement, and vested in the covenantee no estate or interest in the land. The arrangement was one of the first modes instituted under the feudal law, whereby the feudal tenant could secure a stranger, for money loaned, by a lien upon his property. The tenant of the land was not then allowed to alienate his estate in the land, or any interest therein, by way of mortgage or otherwise. He could only license his creditor to enter and take, of his chattel property, as a security for his debt. This mode of security was called a rent-charge. It had been superseded before the first settlement of this country. The mortgage of lands and liens by judgment had taken its place. Rights to take personal property were given by chattel mortgages, which were, in the first place, a sale of the personal property, with conditions in favor of the mortgagor, whereby he could defeat the mortgage; and if the mortgagor did not so defeat it, the mortgagee might take and sell, or might hold the property.

- Regarded in the light of principle, no such thing as a hereditament can be created here out of such a transaction. A mere promise to pay or to do, which is only an executory contract, cannot be made a hereditament by any possible judicial construction, as the law now exists in this country. It is conceded to be only a chose in action.

De Peyster v. Michael, 6 N. Y. 487, 506; *Van Rensselaer v. Hayes*, 19 id. 91.

And it is conceded, that it would be absurd to hold, that a mere executory agreement, a mere covenant to pay or to do, would be a hereditament. There must be something in the way of a principal investment, either of a real or of a personal character, from which the annual sum is to flow; and

it is the principal investment which descends, whenever there is any thing descendible about it. Thus in *Van Rensselaer v. Hayes*, 19 N. Y. 79, it was said, "If the annual payments provided for in these conveyances were merely sums in gross, secured by personal covenants, the action would have been rightly brought by the executors for the last year's rent, though it fell due after the testators' death. The contract upon that theory would have been of the same character as a bond for the payment of money by annual installments in perpetuity, in which case, if we can conceive of such a security, the personal representatives of the obligees would have been the proper parties to bring the action, whether the payments sought to be recovered matured before or after the testator's death."

There is no doubt that, at common law, no personal rights descend directly from the ancestor to the heir, except a certain class of contract rights. In determining what is necessary to bring a case within that class, two things are to be considered : 1. The contract right must be a vested right, as distinguished from an executory right ; in other words, it must be a right in possession, instead of a mere right in action. 2. The obligations of the contract, whereby the right in possession is vested, must extend to and embrace the heirs. The fulfillment of these requisitions constitute a hereditament, and nothing short of that will.

So far, there is no difference between a corporeal and an incorporeal hereditament. That distinction is determined in this way, as before shown : When the subject of the vested right of possession is land, the hereditament is corporeal ; when it is not land, it is incorporeal. An estate in fee in land, is the practical example of a corporeal hereditament in this country. There is no other instance of that class of rights ; and it is not easy to conceive of one distinct from that.

Incorporeal hereditaments, as enumerated in England, cover a wider field, and embrace numerous subjects. Practically, there seem to be no examples of that class in this

country, unless the rents involved in the cases referred to are of that class, which is certainly questionable.

The authorities in this country, which treat of rents-charge and rents-seck as incorporeal hereditaments, have evidently failed to discriminate clearly between rents of that description and rents-service; or, at least, they have failed to express the distinction so as to be readily intelligible to the reader.

Some authorities undertake to put what they call rents-charge and rents-seck into one class, and to distinguish them as *fee-farm* rents. They thus manifest their confusion of ideas in a way which can hardly result otherwise than in the confusion of the student, who undertakes to follow them. That attempted classification is erroneous in a two-fold manner. In the first place, a *fee-farm* rent is a rent reserved to the lessor in a lease in fee, in return for the use of land, and is, therefore, a *rent-service*, in the true, common law sense of that term. That is the definition of a *fee-farm* rent concurred in generally by the established authorities.

In the second place, the rents-charge and rents-seck of the English law, were not necessarily in fee. They were as commonly limited to the grantee for life or for years. There is, therefore, an obvious impropriety in applying the term *fee-farm* to embrace in one class that description of rents. The same authorities, which proclaim such classification, inform us, that the estate in the rent may be for life or for years, as well as in fee. And it would be clearly a misnomer to call a rent-charge, granted to one for life or for years, a *fee-farm* rent.

The misapprehensions attending this subject, manifested in the decisions of this country, seem to have arisen chiefly, if not entirely, in connection with estates in fee in land. There is no reported case of an alleged rent-charge or rents-seck, connected with an estate for life or for years in land, except, perhaps, where rent-service has been mistaken for rent-charge, because of a provision in the contract of lease, that the lessor might distrain upon default in the payment

of the rent. There are numerous cases where tenants for years have made what they supposed were leases reserving rents, and where they have been defeated in their attempts to collect their reservations as rents, on the ground that their supposed leases covered their entire term, and therefore operated as assignments and not as leases. But in those cases, there is no attempt to call the rent, either rent-charge or rent-seck, and thus to make out, in the claimant of it, the rights and remedies of a landlord. That kind of effort has been made only upon estates in fee; and seems to have been induced by the failure to understand what an estate in fee is, and how it exists; and a consequent failure to comprehend the purpose and effect of the statute *quia emptores*.

Had that statute been omitted in the legislation of this country and every owner in fee left at liberty to make leases in fee, as was the case in England before the statute, there would be no case in our reports of an alleged *rent-charge*. The cases, now sometimes cited as examples of that character, would all find their appropriate classification under the head of rent-service. It has been only when the courts were forced to hold that the rents in question were not rent-service, because the instruments of conveyance left no reversion in the parties making them, by reason of the operation and effect of the statute *quia emptores*, that the doctrine of rent-charges and rent-secks has been put forth as applicable in this country; and in those cases, for the most part, the only change made in the course of the adjudications has been a change of name. What was before called rent-service was afterward called rent-charge. But the rights of the parties are not held to be changed. The claimant of the rent is allowed to have the same rights and remedies, as the reversioner of an estate in fee had under the feudal law. The reasoning has been, substantially, if not expressly, as follows: A rent-service is a rent, and a rent-charge is a rent, and therefore there is no difference between them, except in name. Apparently self-assured by that scholastic mode of reasoning, the courts have sometimes regarded the rights and remedies

of the parties, on the one side, and the liabilities and subjection, on the other, to be the same as they existed in England between the feudal lord and his vassals, before the enactment of the statute *quia emptores*. They present examples of an uninstructed prejudice in favor of the feudal system, which had outlived the system itself.

There is, therefore, nothing in the class of cases referred to, which assumes to lay down any principle that may distinguish a rent-charge or a rent-seck, or which attempts discussion of that character. Judges have repeated the doctrine of the old English authorities, that a rent-charge was descendible and devisable, and have allowed what they called rents-charge to pass in that way, because estates in fee in land are here, as they are in England, devisable and descendible. But as to the manner and principle of making any right descend, except an estate of inheritance in land, according to the rules of the common law, as established in this country, the cases are entirely silent.

We have examined this subject at more length than may seem to have been required by the position taken, that neither rents-charge nor rents-seck exist in this country. It is certain that the ancient English practice touching this class of interests is practically unimportant here. It has been rendered, however, theoretically important, by reason of the use made of it, in the decisions of the New York courts, in their efforts to ingraft upon the institutions of that State the most odious features of feudalism. When forced to hold that the State is the reversioner of every estate in fee, and that no feudal tenure can exist between one person and another, they virtually declare that result to be practically unimportant, upon the ground, as they argue, that rents which are not rents-service are rents-charge; that rents-charge, like rents-service, are descendible and devisable; therefore, as their argument runs, rents-charge are precisely like rents-service, and the owner of a rent-charge is entitled to all the rights and remedies which belonged to a feudal lord in the middle ages.

Regarded in the light of principle, it is difficult to perceive how a rent-charge can be made a hereditament in this country. Take for example, a case precisely like *Jemot v. Cooley*, in its facts. A. owns a farm in fee, and borrows of B. \$1,000. He enters into an agreement that he will pay B. \$70 a year, he and his heirs and assigns forever. Let the agreement stop there, and there would be only an executory contract. B. would have a mere chose in action, to be enforced like other promises to pay, and which, on B.'s death, would go to his executor or administrator, and would not descend to his heirs.

Now, supposing there is added to that promise a further agreement, on the part of A., like the agreement in *Jemot v. Cooley*, that if A. or his heirs or assigns fail to pay the seventy dollars yearly when it becomes due, B., or his heirs or assigns, may enter upon the land and distrain; and for want of chattel property whereon to distrain, "may enter into the lands and receive the profits until he shall be satisfied of the arrears." With that addition, does the interest of B. become a hereditament, which, upon his death intestate, would descend to his heirs?

If so, it could only be upon the theory, that the agreement to allow B. to enter upon the premises and distrain, or to enter and take the profits, was in B. a vested right. It must have been upon that theory, that interests of that kind were called hereditaments in England.

However operative to constitute a vested right such agreement may have been in England, there are insurmountable obstacles to it here. To allow it such operation, would be utterly inconsistent with the principles established in this country to regulate individual rights of property; for it would subject the owner to be deprived thereof without due process of law; and, indeed, without even any process at all. It would be giving to one man a vested inheritable right to deprive another man of his property. The most that could be claimed for such a contract, would be, that it might operate as a license, until revoked; and the revocation could only

subject the contracting party who should revoke, to damages for a breach of his contract.

But thus far, we have looked at such an agreement only to the extent that it might be applied to the party who made it. To constitute it a hereditament, it must be held to affect the rights of the heirs and assignees of the contracting party to an indefinite limit. The rights of property, of every succeeding owner of the estate in fee, must be held as subordinated to the right of being taken and appropriated by the heirs and assignees of the other party to the contract. This would be utterly at war with the principles of individual rights of property established in this country.

A contract provision of that character has been held to vest no right in the party claiming to exercise the remedy, even when the provision was inserted in a lease of land in favor of the reversioner against his tenant. .

Guild v. Rogers, 8 Barb. 502, 504; *Van Rensselaer v. Snyder*, 18 N. Y. 299.

It was decided to be no more than a conventional remedy, which the legislature had a right to abolish. It could not, therefore, be construed to constitute a vested right, without which there could be no hereditament.

CHAPTER III.

WHAT RIGHT OF PROPERTY IN LAND IS NECESSARY TO BE IN THE ANCESTOR, AT THE TIME OF HIS DEATH, IN ORDER TO DESCEND TO HIS HEIRS, IN CASE OF INTESTACY; THE COMMON LAW RULE AS TO THE SEISIN OF THE ANCESTOR, AND WHAT IS REALLY MEANT AND REQUIRED IN THAT RESPECT; AUTHORITIES COMPARED AND REVIEWED; THE LAW IN THAT RESPECT IN THIS COUNTRY.

Estates in fee, of which the ancestor died seised, descend to the heirs at common law. No other estate in land is descendible, because, in no other, is the heir embraced in the provisions of the contract which created the estate. It is not provided, in grants or leases of other estates, that the heirs may enjoy the right of possession after the death of the grantee or lessee. Consequently, in other estates, the heir has no claim to rights of succession, according to the rules of the common law.

The debatable question, upon this branch of the common law, relates, chiefly, if not entirely, to the character of the seisin, or right in and to the fee, which the ancestor must have at the time of his death, in order to entitle his heir to become his successor in the estate. At common law, the ancestor was required to have seisin in deed, or actual seisin, because seisin of that character was formerly required to constitute a perfect title; that is, to make a person a party of the second part to the contract of grant or lease which created the estate. But what constitutes actual seisin, within the requirements of the rule, has been frequently the subject of discussion; and has undergone some apparent changes during the progress of the adjudications.

The rule of actual seisin, or seisin in deed, construed literally; would have demanded that the ancestor should, in all cases, have died in the actual possession of the premises. He must not only have had title, that is, have become the party of the second part to the grant or lease, by which the estate had been created, by being the original grantee or lessee, or by becoming the successor to such original party, by descent, by devise or by assignment, but he must also have actually entered upon the premises, after formally becoming such party, in the manner required to constitute what was characterized as seisin in deed. The reason of the rule was, that no person could acquire a perfect and complete title to an estate of inheritance, by simply becoming the nominal party to the grant or lease of such estate. He must also have had actual possession of the premises, or must have conformed to some ceremony, which the law accepted as equivalent. The conjunction of both those things was required to constitute a perfect or complete title which could descend to heirs.

8 Cruise Dig. 359, § 16; 2 Bl. Com. 208; 4 Kent, 386; Co. Litt. 11 b.; Litt. § 8.

This doctrine of the common law will be more readily understood, by a reference to some of the cases where the rule of seisin has been practically applied. Thus in *Jackson v. Hendricks*, 3 John. Cases, 214, it was held that a life estate prevented seisin in the heir; and that, consequently, the heir failed to become the stock of descent. The facts of the case were as follows: A married woman died seised of the premises, in 1775, leaving a husband and two sons and three daughters. The husband remained seised as tenant by the curtesy, until his death in 1798. The oldest son died intestate in 1784. The question was, whether the mother or the oldest son was the stock of descent; and that depended upon whether the son was ever seised of the premises. The court decided that the son did not become seised by reason of the life estate in his father; and that, consequently, the mother was last seised, and was the person from whom the descent was to be derived.

The same doctrine has been applied in other cases.

See *Bates v. Shraeder*, 18 John. 260; *Jackson v. Hilton*, 16 id. 96.

This was conceded to be the doctrine of the common law, in *Whitney v. Whitney*, 14 Mass. 88. In that case a tenant in fee devised certain real estate to his wife, during widowhood, and after her death or marriage, to his several children, as though no devise had been made; and died, leaving several children. After his death, and before the marriage or death of the widow, one of the sons died insolvent, leaving an only son. The question was, whether the estate which this surviving son took in the premises was subject to his father's debts. At common law, that question depended upon the ulterior question, whether the surviving son took from his father, or from his grandfather, as the stock of descent. It was decided that he took from his grandfather; that his father was never seised, because of the existing life estate in the widow; and that the lands, at common law, were not subject to the father's debts. They, however, held the lands subject to the debts by reason of the provision of a certain statute.

But the possession of a tenant for less than a freehold estate, seems never to have been regarded as an obstacle to the seisin of the owner of the inheritance. For, in such case, as it is said in *Bushby v. Dixon*, 3 Barn. & Cress. 305, per Bailey, J., "Where there is a tenant, his possession becomes that of the heir immediately on the death of the ancestor."

The action in that case was brought to recover upon a bond, made by the father of the defendant, upon the alleged ground that the defendant had taken the estate by descent, as the heir of his father, and therefore had assets of the father which were subject to be applied in payment of the bond. The defense was that the father was never seised of the premises, in a manner to pass them from him to his son by descent. It appeared that at the time the father's alleged right accrued, the premises were occupied by a tenant from year to year, and continued to be so occupied at his death;

and that the tenant did not pay rent to the father, but to another person who claimed as devisee. It was the fact that the tenant paid rent to another, which was claimed by the defendant, to distinguish the case, and to prevent the requisite seisin in the father. But the court decided, that the possession of the tenant from year to year, was the possession of the heir, and that the payment of rent to another did not affect the result in that respect.

Assuming the fact to be true, that the tenant in possession was the tenant from year to year of the heir, the correctness of the conclusion of the court was not, and could not be questioned. But supposing the tenant in possession was actually the tenant of another person, who claimed to hold by an adverse title, then it would be equally clear, that the possession of the tenant was not the possession of the heir, and the decision of the court could not be sustained. So that, although the law of the case, upon the facts assumed by the court, was undeniably correct, it will be difficult to justify the assumption of the facts from any thing which appears in the reported case. To hold that a tenant in possession was the tenant of the claimant, merely because he was in possession, when the fact was undeniable that he was the tenant by an alleged adverse title, would be deciding that there could be no adverse holding, and would, therefore, be obviously absurd.

But while it was the general rule of the common law, as stated in *Bushby v. Dixon*, before cited, that "where there is no one in possession at the death of the ancestor, there must be an actual entry by the heir to give him the seisin in fact," yet that rule was not literally and strictly applied and exacted. It was said by Story, J., in *Green v. Lister*, 8 Cranch. 245, that "it has been supposed, in argument, that an actual entry under title, and perception of esplees were necessary to be proved in order to show an actual seisin. But this is far from being true, even at the common law. There are cases in which there is a constructive seisin in deed, which is sufficient for all the purposes of action in legal intendment."

And, in exemplification of his construction of the rule, he cites the instance of land held by a tenant for years, and the case put by Littleton, of the man who had several parcels of land in the same town or county, not occupied by any adverse holding, and enters upon one lot only, in the name of the whole, that such entry constitutes actual seisin of all the parcels.

See Litt. §§ 417, 418, 419.

The same doctrine has been proclaimed in New York. An example is to be found in *Vanderheyden v. Crandall*, 2 Denio, 21, where it is said by the court, per Beardsley, J., that "seisin *in deed* is sometimes called *actual* seisin, or seisin *in fact*, for each expression has the same meaning; and it exists where a person is in the actual possession of a freehold estate in lands or tenements corporeal. This seisin may be acquired by one who has a legal right to such an estate, in various ways; as by an entry in person, or by an agent or guardian. The possession of a lessee for years is also, for this purpose, the possession of the owner of the freehold, so that one who has a reversion or remainder in fee, expectant upon the determination of a term for years, is in the actual seisin of his estate."

A distinction was made, in regard to the common law requisition of seisin to constitute the stock of descent, between estates taken by descent and estates acquired by purchase; holding that a person who acquires by purchase, the reversion or remainder in fee, expectant on a freehold estate, need have no actual seisin to constitute him a stock of descent, while a person taking by descent must have actual seisin. The ground upon which this distinction was made to rest, was, that no person could acquire the title by purchase without livery of seisin. Actual delivery of the possession of the premises, or some ceremony accepted in the law as its equivalent, was required to perfect a purchase. Acquisition by purchase was, therefore, regarded as necessarily and presumptively attended by seisin; while claiming

by descent was not; and required additional evidence upon that point.

See Watkins on Descents, 18, 14, 21.

The purchaser was presumed to have been seised, because he could not have become a purchaser without actual seisin, or without some ceremony which was accepted by the law as actual seisin; while he who claimed by descent had no such presumption in his favor; and additional evidence was required upon that point to perfect his right in order to constitute him the stock of descent.

The original principle of the common law doctrine of seisin, is well explained in the opinion of the court in *Green v. Lister*, before cited, as follows:

"It is highly probable that the foundation of this rule was laid in the earliest rudiments of titles at the common law. It is well known that, in ancient times, no deed or charter was necessary to convey a fee simple. The title, the full and perfect dominion, was conveyed by a mere livery of seisin in the presence of the vicinage. It was the notoriety of this ceremony, performed in the presence of his peers, that gave the tenant his feudal investiture of the inheritance. Deeds and charters of feoffment were of a later age; and were held not to convey the estate itself, but only to evidence the nature of the conveyance. The solemn act of livery of seisin was absolutely necessary to produce a perfect title, or, as Fleta calls it, *juris et seisinæ conjunctio*."

This distinction was recognized in *Vanderheyden v. Crandall*, before cited. It was said: "It is a well known rule in the law of descents, that a reversion or remainder in fee, expectant on a freehold estate, will not, during the continuance of such freehold estate, pass by descent from a person in whom title thereto had vested by *descent*, as a new stock of inheritance, unless some act of ownership, which the law regards as equivalent to an actual seisin of a present estate of inheritance, had been exercised by the owner, over such expectant estate. But it is otherwise where the future estate

was acquired by *purchase*, for the purchaser becomes a new stock of descent, and, on his death, the estate passes directly to his heir at law. This distinction is entirely settled by authority, and it will be found to reconcile various cases which would otherwise seem to be in conflict with each other."

The same point was again elaborately argued before the same court in *Van Rensselaer v. Poucher*, 5 Denio, 35, with a similar decision of the court as to the general rule.

In the case last cited, a point seems to have been made by counsel, that seisin related to the land, independently of an estate in the land. The court answered that position, by saying, that, "seisin, as we understand the term, has reference to the *estate*, and not to the thing in which the estate exists. In strictness, therefore, the owner of land, etc., is not seised of the land, etc., but only of an estate therein."

While it is evident that the position of counsel in that case, that there could be a seisin of lands, "distinct from, and irrespective of, an estate in such lands," cannot be sustained, it is equally clear that the court erred as widely on the other side of the question.

It is true, that, "in strictness, the owner of the land is not seised of the land, but only of an estate therein;" but the livery of seisin which the common law required to perfect the investiture of the estate, related to the land itself. It was required that the feoffee should be put in actual possession of the premises as the owner of the estate. It was not enough that he was formally made the party to the contract, which created the estate. Nor was it sufficient, that he was put in possession of the premises, irrespective of the estate. The possession was required to be delivered to him as the owner, and in the name of the owner of the particular estate intended to be vested.

4 Cruise Dig. 50 *et seq.*; Co. Litt. 48 a.

But in any view, it is difficult to see how that point could have had any material bearing upon the question before the court. In that case, the vested remainder was decided to

have come to the ancestor by purchase, and he was, therefore, the stock of descent, without evidence of seisin, beyond what the law presumed, from the fact that he was in by purchase.

These cases were expressly sanctioned by the Court of Appeals, in *Wendell v. Crandall*, 1 N. Y. 491. It was said by the court, per BRONSON, J., that, "one who has a vested remainder in fee simple, expectant on the determination of a present freehold estate, has such a seisin in law, when the estate was acquired by purchase, as will constitute him a stirps or stock of descent."

Proof of actual seisin, or of something equivalent, was necessary to be made only in cases where the ancestor acquired his claim by descent. That rule did not embrace titles acquired by purchase; and the reason of the distinction was, as before intimated, to be found in that rule of the feudal law which required actual seisin, or something equivalent, to complete or perfect title in an individual, whether the acquisition was had by descent or purchase; and, in case of purchase, the seisin was presumed; while, in case of descent, it was not, and remained to be, in some way, made out by evidence.

See Co. Litt. 266 a, note 217; id. 239 a; 2 Bl. Com. 208, note 10; Co. Litt. 111 a; Watkins on Descents, 21.

Thus, in Chitty's Law of Descents, 49, the author says: "The law requires this notoriety of possession, as evidence that the ancestor had that property in himself, which is now to be transmitted to his heirs. Formerly, while feuds were precarious, the vassal, on the descent of lands, was admitted into the lord's court, and there received his seisin, in the nature of a renewal of his ancestor's grant, in the presence of the feudal peers, till at length, when the right of succession became indefeasible, an entry or other notorious possession was admitted as equivalent to the formal grant of seisin, and made the tenant capable of transmitting his estate by descent. The seisin, therefore, of any person thus understood, makes him the root or stock from which all

future inheritance by right of blood must be derived, as briefly expressed in Fleta's maxim *seisina facit stipitem*."

Actual seisin and livery of seisin were only required as a part of the evidence of title, in order to give notoriety to the transaction and secure a perpetuation of evidence, at a time when transactions between individuals were not evidenced by writing, because individuals had not then learned to read or write. That rule of evidence is well illustrated in *Green v. Lister*, 8 Cranch, 246, before cited. It is said, "In like manner, if a man have a title of entry into lands, but dare not enter for fear of bodily harm, and he approach as near the land as he dare, and claim the land as his own, he hath presently by such claim, a possession and seisin in the lands, as well as if he had entered in deed. And livery within the view of the land will, under such circumstances, give the feoffee a seisin in deed as effectually as an actual entry. There are, therefore, cases in which the law gives the party a constructive seisin in deed. They are founded upon this plain reason, that either the claim is made sufficiently notorious by an actual entry into part, of which the vicinage can take notice, or the party has done all that, under the circumstances of the case, he was bound to do."

The entry upon the land was required merely as a part of the evidence of the contract between the parties, and, under certain circumstances, the ceremony was sufficiently performed by a formal delivery in sight of the premises.

It follows, therefore, from the well established rules of the feudal law, that the doctrine of actual seisin was not strictly a rule in the law of descents, but was only a rule of evidence in the law of conveyances. To become the stock of descent, it was necessary only to die holding a perfect and complete title to the estate of inheritance. So long as actual seisin, or some ceremony accepted by the law as equivalent, was required to perfect such title, so long actual seisin was required to constitute the stock of descent. But when livery of seisin was superseded by other evidence, so that a person could acquire a perfect title without it, then actual seisin

ceased to have any practical effect in determining the stock of descent.

In that view of the subject, it may be safely said, that the law as to what shall constitute a person the stock of descent, has undergone no material change from the common law, in this country. Whenever a person died having a perfect and complete title to an estate of inheritance, intestate, he was the stock of descent; and so is now the law generally in this country. The change has been in dispensing with livery of seisin, as a necessary part of the evidence to prove a perfect title.

This proposition will be readily understood, when the facts which make up such a transaction are plainly stated. The estate of inheritance is the result of a grant or contract of the State. The party of the second part to such contract has a perfect title to the estate. Upon his decease, intestate, he has become the stock of descent; that is, his heirs succeed him as parties of the second part to the contract. At common law, formerly, no person could become a party, without furnishing evidence that his claim of title had been attended by actual entry upon the premises, or by some act equivalent thereto. That entry or possession was called seisin. Upon the death of a person, supposed to have been such party, when the question arose as to who succeeded to him, the first question was, assuming the existence of the estate of inheritance, whether the deceased person was actually the party to the contract, which created the estate at the time of his death. If his claim of title was by descent, the question was whether he had ever been seised. If he had been, he became the stock of descent, because the evidence was complete, that he was the real party to the grant or contract. If he had not been seised, he did not become the stock of descent, because he was not completely proved to have been the party of the second part to the grant or contract. It is thus evident, that seisin was necessary only to the acquisition of title, and was not otherwise pertinent in determining the stock and line of descent.

The consideration allowed to actual possession, by the feudal law, in determining the rights of parties, is well illustrated in the case of disseisin. In Mr. Butler's note to Co. Litt. 239, note 155, it is stated as follows: "Thus, if A. is disseised by B. while the possession continues in B. it is a mere *naked possession*, unsupported by any right, and A. may restore his possession, and put a total end to the possession of B. by an *entry* on the lands without any previous action.

"If B. dies, the possession descends on the heir by act of law. In this case, the heir comes to the land by a lawful title, and acquires, in the eye of the law, an *apparent right of possession*; which is so far good against the person disseised, that he has lost his right to recover the possession by entry, and can only recover it by an action at law."

The rights which the law concedes to a party by reason of his actual possession of premises, have been much abated from the rule thus stated, but actual possession still holds a prominent place as evidence of title, as we shall show when we come to treat of titles which are founded upon no other evidence than such as the law infers from possession. We have referred to it in this place, merely to show the consideration which the feudal law attached to actual possession as one of the evidences of title, and thus to aid in demonstrating the character of the doctrine of seisin, as it is associated with the common law rule of descents.

It would seem to follow as a matter of course, that wherever and whenever livery of seisin ceased to be necessary to constitute a perfect title of an estate of inheritance, actual seisin, or its legal equivalent, must have ceased to be regarded as requisite to constitute the stock of descent. And so it has been generally regarded in this country at least. In *Thompson and Wife v. Sandford*, 13 Geo. 238, it was held that the feudal maxim *seisina facit stipitem* was not in force in that State; and that consequently, "any estate, held by any title, legal or equitable, without *actual seisin*, will descend to the heirs of the owners." And it was further remarked of the feudal law, in that respect, that "the rule,

from the beginning and up to this moment, could have no application here, because wholly unsuited to the condition of things in this State. The reason of the rule also has ceased, and therefore it has ceased. If the reason for it is found in the necessity of evidence to the vicinage of the ownership of lands, the reason ceases, because our registry acts furnish more abundant evidence of ownership than seisin could possibly do." And it was further said, that the statute had fixed the root of descent, so that "any one departing life, and at death holding real property, is the root of descent."

In New York, it was provided by statute in 1786, "that where any person shall die seised of any lands, tenements or hereditaments, without devising the same in due form of law," the inheritance should descend in a certain manner there specified.

See 1 R. L. 52, § 3.

That provision was held not to change the common law rule of seisin.

In the Revised Statutes of New York, it is provided, that "the real estate of every person who shall die without devising the same, shall descend," in a certain manner there prescribed.

1 R. S. 751, § 1.

And in section 27 of the same chapter, the term real estate is defined "to include every estate, interest and right, legal and equitable, in lands, tenements and hereditaments, except such as are determined or extinguished by the death of an intestate, seised or possessed thereof, or in any manner entitled thereto, and except leases for years, and estates for the life of another person."

So far as the question of seisin is concerned, there was nothing in either statute to change the common law rule. That was changed by another provision, as follows: "The mode of conveying lands by feoffment with livery of seisin is abolished."

1 R. S. 738, § 136.

In *Hillhouse v. Chester*, 3 Day, 166; it was held that "the maxim *seisina facit stipitem* had never been adopted in Connecticut.

In most, if not all the other States, that maxim was either never adopted, or has been disused; and the heir now takes all estates of inheritance which the ancestor owned at the time of his death, not disposed of by devise.

In the case of *Fairfax's Devisees v. Hunter's Lessee*, 2 Peters, 627, the court declared the doctrine that, "even if there had been no acts of ownership proved, we should have been of opinion that, as there was no adverse possession, and the land was waste and unappropriated, the legal seisin must be, upon principle, considered as passing with the title."

See, also, *Williams v. Amory*, 14 Mass. 25.

Wherever livery of seisin has been dispensed with, as part of the evidence necessary to prove a complete investment of title, there is no ground for any distinction in that respect between an acquisition of title by descent and acquisition by purchase. Any person who dies, while he is the owner of an estate of inheritance, becomes the stock of descent; and possession, or any of the ceremonies substituted therefor, under the name of livery of seisin, are not a necessary part of the evidence to prove the title, except in those cases where possession under claim of title is relied upon to constitute the evidence.

While the law, as to what shall be necessary to constitute a perfect title, has been changed, by omitting livery of seisin, the common law rule, touching the stock of descent, has not been materially changed in this country. It was sufficient at common law, and is now sufficient, to constitute a person the stock of descent, so as to entitle his heirs to become his successors, that he was the owner of the estate of inheritance at the time of his death.

The rule has been changed in England by the statute of 3 and 4 Wm. 4, ch. 106. That statute has so changed the rule there, that it is not enough that a person owned, he

must also have come to that ownership by purchase and not by descent.

The provision of the statute is, that, "in every case descent shall be traced from the purchaser; and to the intent that the pedigree may never be carried further back than the circumstances of the case and the nature of the title shall require, the person last entitled to the land shall be considered to have been the purchaser thereof, unless it shall be proved that he inherited the same; in which case the person from whom he inherited the same shall be considered to have been the purchaser, unless it be proved that he inherited the same; and, in like manner, the last person from whom the land shall be proved to have been inherited, shall, in every case, be considered to have been the purchaser, unless it shall be proved that he inherited the same."

The English statute is unimportant to lawyers in this country, except to show how far English decisions, under that statute, are applicable to the laws of this country, and how far they are inapplicable, upon this point.

In the feudal law, the descent commences from the original grantee or lessee. He is the original party of the second part; and in seeking for the heirs who are to succeed, they must be counted from him, for the obligations of the contract are to him and his heirs. No one else is a nominee of the contract. The feudal law did not anticipate any interruption to that order of succession by alienation, for alienation was not permitted by the feudal law. When, therefore, alienation came to be allowed, the law was forced to a change in that respect, namely, to regard the purchaser, in regard to the matter of descent, as the original grantee, or party of the second part who made the contract. The purchaser became the stock of descent, in the place of the original lessee. Thus Blackstone says: "What we call purchase, *perquisitio*, the feudists called *conquesto*, *conquæstus*, or *conquisitio*; both denoting any means of acquiring an estate out of the common course of inheritance."

This feudal distinction is further described by the same author, as follows: "The difference, in effect, between the acquisition of an estate by descent and by purchase, consists principally in these two points: 1. That by purchase the estate acquires a new inheritable quality, and is descendible to the owner's blood in general, and not the blood only of some particular ancestor. For when a man takes an estate by purchase, he takes it not *ut feudum paternum* or *mater-num*, which would descend only to the heirs by the father's or the mother's side; but he takes it *ut feudum antiquum*, as a feud of indefinite antiquity, whereby it becomes inheritable to his heirs generally, first of the paternal, and then of the maternal line."

It would seem as though the provisions of the English statute referred to, sought to simplify the question of fixing upon the stock of descent, by excluding any possibility of being obliged to trace the line of succession back to the original source, in order to determine the starting point; and, also, from being obliged to go back so far as to put the question beyond readily accessible evidence. Hence the last purchaser was fixed as the stock of descent. He is made, in effect, so far as the line of inheritance is concerned, the original grantee or lessee; — as the party who made the contract with the original grantor or lessor. The entailment of estates is so limited in this country, that we have never yet felt, and probably never shall feel, the necessity of adopting the rule of the English statute in this respect. Every alienation here undoubtedly constitutes the purchaser a new stock of descent, as the law now exists. So far, the English rule and ours are alike. But here the purchaser does not continue to be the stock of descent, until his descendants shall alienate, but only until his descendants shall succeed to his right, and die seised and intestate, when they in turn become the stock of descent in his place. This seems to be the only point of difference between the law of the two countries touching this point.

In conclusion, upon this point, it may be said, that when estates in fee first became hereditary, it was the invariable rule, that no one could succeed thereto as heir unless he could trace his descent back lineally to the first grantee of the fee.

2 Bl. Com. 220, 221.

The grant or lease was to the grantee or lessee and his heirs, and the feudal law recognized no one as an heir, except he could show that he was a lineal descendant. By the very terms of the contract, therefore, no one else could take the estate, because none other were named as parties to the grant. This rule has been so far relaxed in England, that it is no longer necessary to trace one's origin back to the original grantee. It is only necessary to start from the last owner of the fee who became such by purchase.

In this country, there has been a still greater relaxation of the feudal custom, and as a general rule, it is necessary to go no further back than to find who the last owner in fee was, in order to ascertain the point to start from.

To this general rule there are, however, some exceptions, in those cases where the intestate leaves no lineal descendants. Thus in New York, where the intestate has no lawful descendants, but leaves a father, the estate goes to the father, unless the inheritance came to the intestate on the part of his mother, and she be living.

1 R. S. 751, § 5.

A similar discrimination is made in certain cases in favor of the collateral kindred of the father and mother, according as the inheritance shall have come on the part of the one or the other.

1 R. S. 753, § 12.

This principle of continuing the inheritance in the blood of the family from whom it was originally derived, prevails to a limited extent in some other States.

Gardner v. Collins, 2 Peters, 58; Hyatt v. Pugsley, 33 Barb. 373; Valentine v. Wetherill, 31 id. 655.

One who takes in fee by devise, takes as a purchaser and becomes the stock of descent. Thus in Pennsylvania, where there was a devise of the inheritance to the widow, and by her a devise in fee to her children, who died intestate, and without issue, the inheritance was held to descend from them to their next collateral relatives on their mother's side, to the exclusion of the next collateral relatives on the father's side.

Walker v. Dunshee, 88 Penn. St. 430.

CHAPTER IV.

REMAINDERS, WHEN SO VESTED AS TO CONSTITUTE THE REMAINDERMAN THE STOCK OF DESCENT, AND WHEN NOT; THE ONE CLASS DISTINGUISHED AS VESTED, AND THE OTHER AS CONTINGENT REMAINDERS; DISTINCTIONS BETWEEN THE TWO CLASSES, AND THE RULES WHEREBY TO DETERMINE THE ONE CLASS FROM THE OTHER; THE REPORTED DECISIONS GENERALLY EXAMINED AND REVIEWED.

SECTION I.

GENERAL VIEW OF THE SUBJECT.

SECTION II.

CASES WHERE THE REMAINDER IS HELD TO HAVE VESTED IMMEDIATELY ON THE DEATH OF THE TESTATOR, SO AS TO CONSTITUTE THE REMAINDERMAN THE STOCK OF DESCENT, IN CASE OF HIS DEATH INTESATE.

SECTION III.

CASES WHERE THE REMAINDER WAS HELD NOT TO VEST ON THE DEATH OF THE TESTATOR, SO AS TO CONSTITUTE THE REMAINDERMAN THE STOCK OF DESCENT; BUT WAS HELD TO BE POSTPONED TO A LATER PERIOD.

SECTION IV.

CASES WHERE THERE IS A TEMPORARY TRUST, EXPRESS OR IMPLIED, CONNECTED WITH THE INTEREST IN REMAINDER.

SECTION I.

GENERAL VIEW OF THE SUBJECT.

Although it is the generally accepted rule, in this country, as shown in the preceding chapter, that it is enough to constitute a person the stock of descent, that he was the owner of an estate of inheritance at the time of his death, and died intestate, difficulties sometimes arise in determining what interest a man must have had in the estate, at his death, in order to be regarded in the law as the owner. What consti-

tutes such ownership? When the facts are conceded or proved, the legal question is, was the deceased, at the time of his death, the party of the second part to the grant or contract of lease which constitutes the estate of inheritance?

This class of cases grows out of transfers like this: When the owner of an estate of inheritance conveys by deed, or by will devises his estate to one for life, and after that to others, the part disposed of after the expiration of the life-tenancy is called a remainder. For the definition of the term remainder, and the interest denoted by it, see Bingham on Real Estate, pages 40 to 42.

The frequent and perplexing questions arising in case of remainders, in connection with the rights of descent, are those which depend, in some way, upon a specified contingency or condition, or upon different contingencies or conditions. Where there is no condition or qualification named in the deed or will, the remainder is regarded as vested in the person named to take it; and he becomes so far the owner of the estate, as soon as the time of vesting arrives,—usually the death of the testator,—that, if he should die intestate, the estate would descend to his heirs; although the time when he was to be entitled to the possession, did not arrive before his death. And the remainderman, in such case, has also an interest which he may dispose of by deed or will before his right to immediate possession arrives. Such an interest is known as one which is assignable, devisable and descendible. So far there is but little, if any thing, which can perplex the lawyers or the courts.

It is only when to the remainder there are attached conditions to be performed, as conditions precedent, or events named, which are to happen, or fail to happen, as precedent incidents, that the skill of the lawyer and the discriminating conclusions of courts are necessary to be invoked to determine the rights of contending parties.

But the exigencies of such events can hardly be considered to require the very numerous and complex classifications and distinctions, made by Mr. Fearne, and the writers of that

class, in regard to contingent remainders. So far as the question now under examination is concerned, fortunately, it seems to demand, in this country, but a small share of that very nice learning, and the great variety of ideal distinction, presented in Mr. Fearne's treatise. It will be seen, that the authorities, in this country, at least, have circumscribed the discriminations to a much narrower limit than is prescribed by that author, and that they require classifications much less numerous and difficult of practical application.

The classification of remainders into vested and contingent, is all the classification which the subject now under consideration demands. Whatever else of classification is worth preserving, will receive the proper attention when we treat upon the creation of remainders, by deed or devise. For the purposes here under examination, it is only necessary to be understood, that remainders are either vested or contingent; and that a vested remainder is that part of an estate bestowed upon one person, to take effect in possession, at the close of the interest of another person, with no contingent provision, condition or event, intermediate, which can possibly defeat the rights of the remainderman. In considering the distinction, in this respect, it may be truly said, that a remainder is properly contingent, when the person named to take it may possibly be defeated in his right of property, by some event designated and provided to have that effect; or when the person who is to take, depends upon some contingent event.

Remainders are also sometimes erroneously characterized as contingent, merely because the particular time of possession or enjoyment is made to depend upon contingent events, although the possession or enjoyment is made certain in the end to the person named, his heirs, devisees or grantees. It will be found, that many of the questions under this point have arisen from confounding these two classes of contingencies; or, rather, from the difficulty of distinguishing between them.

It will be seen at once, that they differ in this at least. In the one class, there is no contingency as to the person who is to take, but only as to the time when the person designated is to enjoy or possess. In the other, the contingency relates to the person who is to take, and may be fixed and certain as to the time when some one is to take.

It should be borne in mind, that, in order to constitute a vested remainder, it is not necessary that the party named to take the remainder shall be certain ever to enjoy the possession of the premises. For example, an estate may be conveyed to one for life, remainder to another in fee. The grantee in fee has a vested remainder, because his right of immediate possession is certain, on the termination of the term for life. But he may die before that time arrives, in which case his right would never come to be a present interest in possession, during his lifetime. But yet he would have a right, which would descend to his heirs, in case he died intestate, and if he failed to get possession, his grantee, or devisee, or heir at law, succeeding to his right of property, would in time come to the possession or enjoyment of the premises.

While there is no dispute what the distinction is, between vested and contingent remainders, it is frequently a matter of no little difficulty to determine from the facts of a particular case, whether the one or the other exists. Nor is it an easy matter to lay down arbitrary rules, whereby the true distinction can be ascertained. There is but one rule of that character, which can be said to have universal application; and that is, that the intention of the party creating the remainder, must govern the construction of the instrument; and that intention must be deduced from the manifestations of the whole instrument taken together. There are some incidental rules which, in some cases, are useful as auxiliary to the deduction of the intention; but it is hardly safe to assume that they are universally applicable. The most reliable knowledge concerning the subject within the reach of the lawyer, short of actual practice must be obtained from the

reported decisions, which are numerous, and present facts and circumstances, with decisions thereon, in almost every conceivable form and variety. By making himself familiar with the deduction of the intention which others have made, in different cases, and the reasons given therefor, the lawyer can approximate toward that practical wisdom which can be gained most perfectly by actual practice.

In accordance with that view of the questions which arise under this branch of the law, we propose to examine the subject in the manner indicated, and to present the leading cases, as fully as seems required to put the reader in possession of what is necessary to understand them, and to understand the rules and principles there stated and applied.

SECTION II.

CASES WHERE THE REMAINDER IS HELD TO HAVE VESTED IMMEDIATELY ON THE DEATH OF THE TESTATOR, SO AS TO CONSTITUTE THE REMAINDERMAN THE STOCK OF DESCENT IN CASE OF HIS DEATH INTESATE.

As before remarked, it will be found impracticable to lay down arbitrary rules, whereby to determine when the remainder vests and when it does not, except the general rule which embraces all cases, that the intention of the assignor or testator must control. The business of the lawyer and of the courts is confined to the ascertaining and determining what the intention was. The rules contrived as auxiliary to that end, although, perhaps, not applicable and safe to be trusted in all cases, are yet of great importance, in aiding in this sometimes one of the most difficult undertakings which can devolve upon the lawyer or upon a court. In learning what those auxiliary rules are, and when and how they may be properly invoked and applied, it seems to be the safest, if not the most profitable course to pursue, to study the leading cases upon this subject, and learn what judges have said of the cases before them. Fortunately for that purpose, the reported decisions are numerous, and various in facts and

circumstances. They are also replete with the learning and wisdom of some of the best legal minds both of this country and of England.

In *Jones v. Roe*, 3 T. R. 87, which was ejectment for a house and garden, the facts were as follow :

John Lockyer, being seised in fee, made his will in 1734. After charging all his lands with certain annuities, he devised the same to his brother Thomas, until his brother's son John, or any other of his younger sons, should attain the age of twenty-one years, whichever should first happen ; and in case his brother should have only one son, then until such only son should attain twenty-one years. And when any such son of his brother should attain twenty-one years, then to that son and his heirs forever. And in case his brother Thomas had no son, that should live to that age, then to said brother and his heirs forever.

The testator died in 1734, leaving his brother Thomas and two sons of Thomas living. One of the sons only, John T. Lockyer, lived to be twenty-one. He married, and, on the 26th of September, 1759, made his will, devising all his estate to his wife in fee, and died in March, 1765, his father, Thomas Lockyer, being then alive. Thomas Lockyer entered into possession of the lands immediately upon the death of the original testator, and continued in possession until his death, in 1785, when the defendants obtained possession. The question was whether the widow of J. T. Lockyer took the estate by the will of her husband, or whether it passed to the heirs.

The interest of the husband was held to be devisable and to have passed to his wife by his will.

In that case, the person who was to take was made certain, not, as it happened, at the death of the testator, but as soon as J. T. Lockyer became twenty-one. In one sense, the case is a departure from the class of cases which this section is designed to embrace. The remainder did not vest immediately on the death of the testator. But it might have vested at his death, had he lived until the son of his brother became

twenty-one. The principal reason, however, for inserting the case here is, that it was among the first cases reported, wherein the question of the devisability of a remainder was the subject of judicial decision.

The second testator, J. T. Lockyer, having attained the age of twenty-one years, and being the only son of Thomas Lockyer then living, came within the contingency of the first will in question in the case, and was, therefore, the fixed devisee in remainder of the premises. There was no further contingency that could disturb his right of succession, as the tenant of the estate of inheritance.

Although the case may be regarded as a leading one, because it was assumed to be a final decision of an important point, it was really made upon the authority of two cases, namely, *Selwyn v. Selwyn*, 2 Burr. 1131, and *Moore v. Hawkins*, which does not appear to have been reported.

In *Selwyn v. Selwyn*, there was a deed of bargain and sale executed by John Selwyn, senior, and John Selwyn, junior, to a person named, whereby a common recovery was to be had, and the recoverors were to stand seized, to the use of the said John Selwyn, senior, for life, with power to lease for twenty-one years; remainder to the use of the said John Selwyn, junior, his heirs and assigns forever.

The deed of bargain and sale was made in April, 1751, and in June, immediately thereafter, the younger Selwyn made his will, devising all his real estate to his father, the senior Selwyn, and died. The question was, whether the lands comprised in the deed passed by the will; and it was held they passed.

The case came before the court from the chancellor for instructions, and, in accordance with custom, the court gave no reasons for the decision.

At this day, there would have been no serious question of that kind. No doubt, that, by the plain terms of the deed of bargain and sale, the junior Selwyn took a vested interest in remainder. There was no contingency about it.

The senior Selwyn was vested with the use of the premises during his life, with the right to lease for a term not exceeding twenty-one years, and the junior Selwyn was vested with the remainder. It was in effect like the ordinary conveyance of lands to A. for life, remainder in fee to B.

The case of *Jones v. Roe* was first decided before the common pleas, and is reported. 1 H. Bl. R. 30.

The syllabus of the case in each report is, "a possibility coupled with an interest is devisable."

And that case has been ever since, and is still, cited as authority for holding that a contingent remainder and a contingent interest of any kind is descendible, devisable and assignable. There are a few cases where that doctrine has prevailed in regard to contingent interests. The mistake of so understanding that case is obvious. It was a case where the remainder was vested, as such rights are now understood. Then it seems to have begotten a different impression, probably for the reason, that under the feudal law, in its early existence, a tenant out of possession was regarded as no tenant at all. Any right which did not give the holder of it the immediate right of possession to the land, was not regarded as vested, however fixed and certain it might be.

We shall have occasion to refer to that point again when we examine the mooted question, whether a contingent remainder or a contingent interest of any kind, in an estate of inheritance, constitutes the holder of such right or interest, the stock of descent of that estate.

It is sufficient here to say, that *Jones v. Roe*, was decided upon the ground, that the remainder was a vested and not a contingent one; and affords no authority to assume, that a mere contingent interest was descendible, devisable or assignable, either by the rules of the common law, or by the authority of any provision in the statute of wills.

We will further again depart from the order indicated in the heading of this section, and present a case of a contingent remainder. The student may be thus aided in obtaining, in the outset, a clear idea of the substantial difference between

a vested and a contingent interest, so that he can carry along with him, as he looks at other cases, the real point of discrimination in that respect.

The case of *Doe*, on the demise of Calkin, against *Tomkinson*, 2 Mau. & Selw. 165, is one where it was held that the remainder was not devisable. John Tomkinson, being the owner in fee of the premises, devised his real estate to his two sisters, or to the survivor of them, to be disposed of by her, the survivor, as she might by will devise. The testator died and left the two sisters named in his will, and also a third sister. One of the two sisters named in the will, made her will during the life-time of the other. The question was, whether her will was operative to pass the estate, which had been devised by their brother, John Tomkinson. It was decided to be inoperative, on the ground that, when the one of the two sisters made her will, it was not determined which of the two sisters was to have the estate; that it depended on the event of survivorship; and that event had not then happened. It was said by Lord Ellenborough, Ch. J.: "Supposing it to be a contingent remainder, I think it cannot be considered as devisable, because the person who is to take is not in any degree ascertainable before the contingency happens; it cannot be said in whom the interest is during the lives of the two sisters, nor, consequently, that it is in either of them during that period; and it is only in the event of survivorship that it becomes certain."

The two last cited cases related to real estate; but the rule in regard to the disposition of personal property, is substantially the same; and the reported decisions, embracing both kinds of property, will be found indiscriminately applicable, with a few exceptions, which will sufficiently appear in the cases themselves.

The principle of *Jones v. Roe* was allowed to govern in *Brown v. Lawrence*, 3 Cush. 390. A devisee in that case, who was considered to take a life estate in the whole premises, and a remainder in fee in one-quarter, was held to have conveyed his right in both by a deed, so as to cut off his heirs

from any claim to the remainder in fee. It was remarked by Shaw, Ch. J., that, "In the present case, the remainder being to the testator's own heirs, these were ascertained at the moment, and by the event of the testator's decease, and *eo instanti*;" and, by the same event, the will took effect. There is no contingency as to who is to take; and the remainder is to take effect upon the decease of the tenant for life; an event regarded by the law as a certain one; the time only of its happening being contingent."

And he stated the distinction between a vested remainder and a contingent one, as follows: "A present capacity of taking effect in possession, if the possession were to become vacant, and not the certainty that the possession will become vacant, before the estate limited in remainder determines, universally distinguishes a vested remainder from one that is contingent."

The point of distinction is, perhaps, more truly stated in another part of the opinion, as follows: "The present appears to us to be a very clear case of a vested remainder; the devise depending upon no contingency affecting the right, but only upon one affecting the time when it should take effect in possession. There was no time when there was not, or when there must not be, by force of the will and the law governing its application, a person *in esse* having a capacity to take whenever the possession should become vacant."

The first distinction in that case, here quoted, was true as to the case then before the court; but the distinction that "a present capacity of taking effect in possession, if the possession were to become vacant," is not always the true test of a vested remainder. For example, take a devise of land to S. for life, and after his death to W., if then living; if W. is not then living, then to the heirs of W. W. has present capacity of taking possession, if the possession were to become vacant by the death of S. But still W. has only a contingent interest, for his right depends upon his surviving S.

This case is suggested from an actual example before us.

The doctrine of remainders and the distinction between vested and contingent remainders, as stated in these cases, seems never to have been intelligently questioned. The cases which appear to conflict therewith are comparatively few, and where opinions have been carelessly expressed without any very distinct ideas of the true rules for determining the one class of cases from the other. The real difficulties which may perplex lawyers and courts, are to be found in the application of those rules to the endless variety of facts, which are constantly arising. But it should be borne in mind, in the investigation of any case of this character, that the intention of the party who made the gift, must control; and the only point to be determined is, what his intention was. And it seems to be the rule generally adopted, that, when, from the language of the will, it is a matter of doubt whether the testator intended to apply language of contingency to the gift itself, or only to the time of payment or enjoyment, the court should apply the contingency to the payment or the enjoyment, and hold the gift as vested rather than contingent. This rule was adopted in Massachusetts, in *Eldridge v. Eldridge*, 9 Cush. 516.

The testator, in that case, gave a legacy to his granddaughter, the plaintiff's intestate, in substantially the following language: "I will and decree, that the said James Eldridge pay over to my four granddaughters"—naming them—"the sum of \$1,000 each, when they respectively come of age." In a subsequent part of the will, the same thing was repeated, as follows: "I also give and bequeath to my granddaughters"—naming them—"the sum of \$1,000 each, when they severally become of age, excepting what may be necessary for their support during their minority."

One of the granddaughters died before she was twenty-one, and the plaintiff, as her administrator, brought the action against the executor to recover the \$1,000 legacy. It was held to be a vested legacy, and not dependent upon the contingency of her arriving at the age of twenty-one.

The court found the intention of the testator to give a vested right, before the full age of the legatee in question, chiefly in the circumstance, that he charged the legacy with the support of the legatee during her minority. It is said : " If it stood upon this clause alone, it appears to us that the intent would be quite clear, because it creates an immediate beneficial interest in the legatee, and the payment only is postponed."

The court also placed much force upon the word " when," as used in the last clause, " when she shall become of age." As to that, it is said, " The word ' when ' applies to the payment, and not to the gift itself. It presupposes that the gift has before taken effect, and a part of it been paid, and provides a time at which the balance, if any, shall be paid. We may even suppose that, in case of unusual sickness, or expensive education, it would not be inconsistent with the provisions of the will, that the testator understood and intended that the whole should be paid over for the use of the legatee during her minority."

The court also applied and relied upon a more general rule of construction. It is said : " But further, upon more general grounds, the words ' give and bequeath,' in a testamentary paper, import a benefit in point of right, to take effect upon the decease of the testator and proof of the will, unless it is made in terms to depend upon some contingency or condition precedent."

The rule that the presumption of law leans to vested rather than contingent remainders, has been sanctioned in other cases.

Shattuck v. Stedman, 2 Pick. 468; *Ferson v. Dodge*, 23 id. 287, 293; *Wright v. Shaw*, 5 Cush. 56; *Stimpson v. Batterman*, id. 153.

In *Bridgewater v. Gordon*, 2 Sneed (Tenn.), 5, there was first, a devise to the wife for life or widowhood, of all the testator's estate. Then " secondly, at the death or marriage of my said wife, it is my will that my estate be equally divided between my children, share and share alike."

The testator died in 1828, leaving his wife and nine children surviving. The widow did not again marry, and died in 1852. Intermediate the death of the father and the mother, in 1834, a daughter, one of the nine children, died, leaving one child.

The question submitted to the court was, whether the deceased daughter had a vested interest descendible to her child, or whether the whole estate passed to her surviving brothers and sisters.

The court decided, that the deceased daughter had a vested remainder, which passed to her child by descent. In arriving at this conclusion, the court expressed much reliance on the equality of the division of the property among the children, provided for in the will, as indicating the intention of the testator to give his children an estate vested at his death.

A legacy in these words: "In the first place I give and bequeath to my grandson, five hundred dollars, if he shall arrive to the age of twenty-one years, then to be paid over to him by my executor hereinafter named," has been held to be a vested legacy.

Furness, Executor, v. Fox, 1 Cush. 134.

The court repeated the general rule of construction which has been allowed to apply in all cases. It is said in the opinion: "The rule on this subject is plainly stated in many judicial opinions and elementary books, and the only difficulty is in a right application of it to particular cases. In 3 Wooddeson, 512, the rule is well expressed as follows: 'If the time of payment merely be postponed, and it appear to be the intention of the testator that his bounty should immediately attach, the legacy is of the vested kind; but if the time be annexed to the substance of the gift, as a condition precedent, it is contingent, and not transmissible.'"

The mode of applying that rule to the facts before them is well stated in that case. It is said: "We have, therefore, only to inquire whether, in the case before us, the words 'if he shall arrive at the age of twenty-one years' relate to the

words which precede, or to the words which follow them ; or, in other language, whether the arrival of the legatee at the age of twenty-one years is a condition precedent to the gift of the money, or only to the payment of it into his hands. And we are of the opinion that the testator meant to make an immediate bequest to the grandson, as the representative of his deceased father, but that the money should not go into his hands during his minority."

This rule was expressly sanctioned in *Eldridge, Administrator, v. Eldridge, Executor*, 9 Cush. 516, before cited.

See, also, *Bowker, Administrator, v. Bowker, Executor*, 9 Cush. 519.

Where a testator devised his real and personal property to his wife for life, and, at her death, one half to his adopted daughter and the other half to his heirs at law, it was held, that the adopted daughter took a vested interest in both the real and personal estate on the death of the testator.

Fay v. Sylvester, 2 Gray, 171.

The principle of these cases is the same. They differ only in the facts to which the principle applies. The same is true of all the cases in this class. They develop nothing new in principle. They are valuable as precedents, only as they familiarize the mind to the application of the principle and the mode of deducing the intention of the testator or assignor in regard to the point in question.

The line of distinction between vested and contingent remainders is well pointed out, in some respects, in *Manderson v. Lukens*, 23 Penn. St. R. 31.

There was a devise of all the testator's real and personal property to the wife for life, or marriage. Upon her death, or intermarriage, the testator directed his estate to be equally divided between all his children, "which may then be alive, or who may have left legitimate heirs, share and share alike."

The court decided that the children took a vested remainder in fee, on the death of the testator. And they denied that the term "whenever," and other like words, referring

to time, could be relied upon as fixed criteria, by which it was to be determined whether an interest was vested or contingent.

So, also, in *Stedman's Appeal*, 45 Penn. St. R. 398, the testator bequeathed all the residue of his estate to his widow for life, and the remainder to his granddaughter; with the further provision, that if the granddaughter should die intestate, without issue, the property should go to the testator's heirs, under the intestate laws. The granddaughter was held to have taken the remainder, vested at the death of the testator. And that after her death, her administrator was, at the death of the widow, who survived her, entitled to recover the unexpended portion of the bequest. It appeared that the granddaughter was the sole surviving heir at law of the testator. The bequest to the granddaughter followed the laws of descent; and the court remarked, that the testator, by the qualifying clause, "did not intend to make his granddaughter's interest contingent." This is a case where extraneous circumstances were evidently allowed to have a controlling effect in deducing the intention of the testator.

A testator devised to one of his sons certain property, and, in a codicil to his will, there was a provision in regard to the property so devised to him as follows: "It is not to be given up to him, but is to be held and kept by my executors, and equally divided between his children, and paid over when they severally arrive at lawful age to receive it." A son of this son died under age, intestate and without issue. This child's share was held to be a vested estate, and to pass absolutely to the father by inheritance upon the child's death.

Wallingford v. De Bell, 15 B. Mon. 551.

This decision was made on the ground that the qualification mentioned in the codicil related merely to the time of payment, and not to the gift or legacy itself. The gift was held to be complete, independently of that provision, while the remaining part of the provision related exclusively to the time of the payment.

A like decision was made in *Lowe v. Barnett*, 38 Miss. 329. It was provided by will, that the property should be kept in the hands of the executors until all of the testator's children were of age. Each one, as he became of age, had the right to withdraw his portion. When the youngest child became twenty-one, or married, there was to be an equal division between the widow and children.

The testator died and the widow again married, and had a child by the second marriage. It was held that the widow and children took vested estates, and the division and possession in severalty only, were postponed until the majority or marriage of the youngest child.

See also *Fitch v. Miller*, 2 Cal. 852.

In *Yeaton v. Roberts*, 8 Foster (N. H.) 459, there was a devise of real and personal property to the wife of the testator for life, then to go to the children of two other persons named; and such other children as those two persons might thereafter have, equally, and in fee. The question was, whether the children thus named to have the remainder, who were alive at the death of the testator, took a vested remainder. It was held that they took a vested remainder, subject only to open and let in after-born children; and that, on the death of one of these children, his share, if personal, passed to his administrator, and if real, to his heir.

This case is an example of that class of cases where children take as a class; and, in one respect, departs from the general rule in other cases. *Chambers v. Payne*, 6 Jones Eq. (N. C.) 276, is a case of that class. In that case, there was a devise of land to a daughter for life; and then to the heirs of her body forever. She had one child which died an infant before the mother. The question was, whether the child took the estate. It was held that the estate in fee vested in the child, so as to constitute it the stock of descent.

It was said by the court, "that when children take as a class at the expiration of a life estate, each child takes a vested interest at its birth, subject to be divested in favor of

all the other children as they are born, and that, upon the death of one of the children during the existence of the life estate, his or her interest goes to his or her representatives, and does not devolve upon the other children by virtue of the limitation, unless an intention to that effect is manifested in the will."

Hocker v. Gentry, 3 Met. (Kentucky) 463, is a similar case, with a like ruling.

In *Bufford v. Holliman*, 10 Texas, 560, the will gave real estate to the wife for life, and then to the testator's own children, and the wife of one of his sons. The remainder was held to vest at the death of the testator; and on the death of any one of the children, before the end of the life estate, the estate of the deceased child was held to have descended to the heirs of the deceased.

In *Lane v. Lane*, 8 Allen (Mass.) 350, there was a provision in the will, directing that certain real estate should be undisposed of during the life-time of the testator's wife and children; and at the death of the last one of them, the whole was to be equally divided "between my surviving legal heirs." In the meantime, the income thereof was to be equally divided between the widow and the three children. Five years after the decease of the testator, the property could be divided into equal shares, not disposing of the real estate further than necessary, but retaining it in the possession of his heirs and widow, an equal share for each, and, thus divided, to be placed in the hands of trustees, in trust for the wife and children. It was held, that the children took a vested estate in fee simple on the death of the testator. It was said by the court: "We think the testator intended to give the property to his children as a vested interest in fee, but wished to prevent a sale or conveyance by them of the interest thus given; inconsistent purposes, which the law cannot carry into effect."

It was then said, that the directions that the estate should be kept undivided, and be placed under trustees, could be treated only as recommendatory.

In *Conly v. Kincaid*, 1 Wins. (N. C.) No. 2 (Eq.), 44, the testator gave to his wife real and personal property for life, and directed the sale of the whole property at her death, and its equal division among his seven children. A daughter, one of the children, died after her father, but during the life of the widow, leaving a husband. *Held*, that she took a vested interest in the property, which passed to her husband as her administrator.

There was a similar ruling in *Clark v. Wallace*, 48 Penn. St. R. 80. There was a bequest of a sum of money to the testator's daughter for life, the interest of which was to be paid to her annually. At her death, the principal was to be equally divided among her children, if they were then twenty-one years of age; and it was not to be paid until they were of that age.

The daughter died after the death of the testator, and left three infant children.

The decision was, that the legacies were vested in the children; and only the payment was postponed until they were twenty-one years old.

The matter was pronounced by the court too clear for argument, and none was made by the court.

This is one of the cases where children are regarded as taking as a class, and when they are born after the death of the testator, they are vested at birth.

There is an example of a vested interest in *Brown v. Brown*, 44 N. H. 281, where the distinction is well expressed and clearly founded. There was a bequest to a grandson of the testator, of a specified sum of money, which was to be paid when the grandson became of age.

This was held to be vested at the death of the testator, so that it would go to his representatives in case the legatee died under age.

The phraseology of the will was: "I do give and bequeath to Hiram S. Brown, son of my said son Charles Brown, the sum of twelve hundred dollars, to be paid to him by the executor of my said will, *when* he shall attain the age of twenty-one years."

The legatee died before he was twenty-one. The suit was brought by his administrator to recover the legacy.

It was said by the court: "It is well settled that when the words of the bequest, which look to the future, apply to the substance of the gift, the vesting is suspended; but if they appear to relate merely to the time of payment, the legacy vests at once upon the death of the testator."

And it is remarked, that where there is a bequest to a legatee, "at the age of twenty-one years," or "if, or provided he arrive at that age," the interest is contingent, unless a different intention be elsewhere expressed in the will. But where the gift is of a sum of money, payable or to be paid at the age of twenty-one, the legacy vests on the death of the testator.

The court placed the case within the last named class.

O'Byrne v. O'Byrne, 9 Md. 512, is a case where a devise was held to be vested, and only the time of payment postponed.

There was in that case a devise of real estate to the testator's widow, until the oldest son should become of age. There was also a devise to the same son of a farm, subject to the payment to each of the testator's three daughters of one thousand dollars, as follows: The interest on said sum to be paid to said daughters by the son, after his maturity, until they shall respectively marry, or attain the age of twenty-one years. The principal to be paid, five hundred dollars at the marriage, or majority of each, and five hundred dollars within eighteen months thereafter. These sums were charged upon the land. One of the daughters, who was two years older than the son, died unmarried and before she was twenty-one; and her administrator sued to recover the sum thus provided for his intestate.

It was held that the legacy was vested at the death of the testator, and its payment was deferred only for the convenience of the estate.

So in *Lantz v. Truster*, 37 Penn. St. R. 482, there was a devise of land to two daughters for life; remainder to such

children as either might have living at her death. Then followed a provision, that if either should die without issue living, the land was to go to the survivor during her life and then to the children of the survivor. Both died, one left children, and the other none, but left grandchildren. The decision was, that the children took vested remainders in fee as soon as born.

It may seem, at first view, difficult to reconcile the decision of this case, consistently, with some other cases, and with the general principle, common to all cases, that the intention of the testator, as expressed, must control. There is, however, one aspect of the case which might be construed to indicate an intention different from what the language of the devise might otherwise indicate, and the presumption is, that that aspect may have controlled the court. The remainder, after the estate of the two daughters for life, was devised to such children as either might have living at her death. Both daughters had children, but one died with none living. Consequently, if the remainder was to be construed as contingent to the children, dependent upon their surviving their mother, the whole would go to the children who survived their mother; and the grandchildren of one of the daughters would take no share in the property. It is unreasonable to suppose that the testator intended any such absurd result; and the presumption is, that the court so regarded it, and construed the devise in a manner to avoid such a conclusion, in obedience to what, from all the facts and circumstances of the case, they might fairly infer was the intention of the deviser.

The case of *Dingley v. Dingley*, 5 Mass. 535, further illustrates the doctrine of remainders. There was in that case a devise to the testator's son Abner, with a provision, that, after his death, the premises should be equally divided between his, Abner's, sons. The son entered and remained seised until his death. When the will was made the devisee had three sons living. After that, he had two more born. Joseph, one of the two latter, died before his father, leaving

the plaintiffs his heirs at law. It was contended that, as Joseph was not born when the will was made, he took, at most, only a contingent, and not a vested remainder; and, of course, that he had no estate which could descend to his heirs. But the court decided otherwise, and said: "We are satisfied that the remainder, in the present case, vested on the death of the testator. And, as all the sons were then born, there was no occasion for it afterward to open to let in any other son.

"Upon these principles, on the death of the testator, Abner, his son, was seised, as tenant for life, with a vested remainder in fee to his five sons. And Joseph afterward dying, his estate remained to his children, the demandants, who are entitled to recover."

Doe v. Provoost, 4 John. 61, is a similar case. There was a devise as follows:

"I devise to my daughter, Christina Provoost, the dwelling-house and ground she now lives on, to hold for and during her natural life; and immediately after her death, I give the same unto and among all and every such child and children as the said Christina shall have lawfully begotten at the time of her death, in fee simple." The daughter had four children when the will was executed. She continued in possession until she died, leaving only one child surviving. One of her children, a daughter, had previously died leaving children. The question was, whether the children of this deceased daughter were entitled to their mother's share; and it was conceded that it depended upon the question, whether there was a vested remainder in this deceased daughter at the time of her death. The court held that there was a vested remainder in this daughter, which descended to her children.

Moore v. Lyons, 25 Wend. 119, is justly entitled to be classed among the leading cases upon this subject.

The action was ejectment, to recover the moiety of a house and lot. The plaintiff claimed title under a will made in 1796. The clause of the will relied upon was as follows: "I give and devise unto the said negro woman, Mary, my dwelling-house and lot of ground." The lot was particu-

"2. Where an absolute property is given, and a particular interest given in the meantime, as until the devisee shall come of age, etc.; and when he shall come of age, etc., then to him, etc.; the rule is, that that shall not operate as a condition precedent, but as a description of the time when the remainderman is to take in possession."

He further said: "Here, upon the reason of the thing, the infant is the object of the testator's bounty; and the testator does not mean to deprive him of it, in any event. Now suppose that this object of the testator's bounty marries, and dies before his age of twenty-one, leaving children, could the testator intend, in such event, to disinherit him? Certainly, he could not. And as to the testator's heir at law, his heir at law is only to take what the testator has not devised away from him."

There are rules particularly applied to phraseologies:

In *Doe v. Lea*, 3 T. R. 41, there was a devise to trustees until A. shall attain the age of twenty-four, and when he shall attain that age, to him in fee. He died before twenty-four, but it was held that he had a vested interest which descended to his heirs. The action was ejectment.

The devise was to Michael Lea, the great nephew of the testator, and to his heirs and assigns forever, *when and so soon* as he should attain the age of twenty-four years. He lived to be twenty-one, but died under twenty-four, intestate and without issue, leaving a brother his heir at law. This brother was the defendant.

It was contended, for the plaintiff, that the words, "when and so soon" as he should attain the age of twenty-four, operated as a condition precedent to Michael Lea's taking any interest under the devise; that they meant the same as these words: "If Michael Lea shall attain the age of twenty-four."

The court denied that construction of the words used in the devise, and, referring to a previous decision, *Boraston's case*, 3 Co. R. 19, Lord Kenyon, Ch. J., said: "There the court held, that the remainder was executed in the son im-

mediately after the death of the testator, and that it did not rest in contingency; and that the words *then* and *when* only denote the time when the remainder shall take effect in possession; for when these adverbs refer to a thing which must of necessity happen, there they make no contingency."

Ashurst, J., said: "The whole question depends on the particular words of this devise. Had the deviser used these words, 'if Michael Lea shall attain the age of twenty-four,' that would have made it a condition precedent, and no interest would have vested in him, unless he had attained that age. But here the devisee's estate was to take effect in possession, *when* he should attain the age of twenty-four. And this is like the case of a legacy *to be paid when* the party attains the age of twenty-one, that is, a vested legacy; but if the legacy be, to be paid *if the legatee attains the age of* twenty-one, it is not vested."

In *Moore v. Lyons*, 25 Wend. 144, before cited, the chancellor said: "A remainder is not to be considered as *contingent* in any case where it may be construed to be *vested*, consistently with the intention of the testator. The adverbs of time, therefore, such as *when*, *then*, *after*, *from* and *after*, etc., in a devise of a remainder, limited upon a particular estate, determinable on an event which must necessarily happen, are construed to relate merely to the time of the enjoyment of the estate, and not to the time of its vesting in interest."

The case of *Doe ex dem. Long v. Prigg*, 8 Barn. & Cress. 231, was cited and relied upon as authority. A similar question arose in that case.

There were two provisions in the will which presented the question. There was a devise to the testator's mother for life; after her death, to his wife for her life; and then, as follows: "And from and after the decease of my mother and wife, I give and bequeath all the above mentioned premises unto the *surviving* children," of certain persons named, "and to their heirs forever; the rents and profits to be divided between them, in equal proportions, share and share alike."

There was a provisional revocation of the devise to the wife, which, if accepted, was to revoke the devise to her ; and then, a devise of the whole to his mother for life, " and from and after her decease," to be divided among the said children, as before provided.

The question was, whether the expression, "surviving children," referred to the time of the testator's death, or the time of the death of the tenant for life. It was held to refer to the first named period.

It seems to have been conceded, that this was a questionable construction, at least, so far as the authorities were concerned. The court said : " We have endeavored, without success, to find a case exactly circumstanced as this is, where, upon a devise, by way of a remainder *to a class*, as this is, words of survivorship have been held to apply to the death of the testator ; but there are so many in which, upon a devise or bequest to *individuals*, they have been held so to apply, that we think we are warranted in saying, that *that* is the right construction in this case."

The court then briefly recapitulate the points and facts of most of the leading English cases, and apply to them this general remark : " In many, indeed, if not in most of these cases, this has been a necessary construction, because the devises or gifts were not to a class, but to individuals."

There is a similar decision in *Doe v. Provoost*, 4 John. 61, in *Johnson v. Valentine*, 4 Sandf. 36, and in many other cases.

It must not be understood, however, that such is the arbitrary rule in all remainders limited to survivors. It is only the rule where, from the whole will, construed in the light of attending circumstances, such was the evident intention of the testator. Where the language of the will, and the attending circumstances, so plainly point to some period later than the testator's death for the remainder to vest, as to leave no doubt of his intention, the later time so designated must be treated as the time. There is a class of cases where the time of the vesting of the remainder is made to

await the death of a person named, in order to determine who are his heirs. The word "heirs" is, in such cases, treated as a technical term, and as the living can have no heirs, the time of death of the ancestor alone is the beginning of the existence of his heirs.

An example of that class is found in *Campbell v. Rawdon*, 18 N. Y. 412, where the devise was as follows: "I give and bequeath to my sons, George Bindon, Joseph Bindon, and my housekeeper, Jane McCready," to them during their natural lives, and after their decease to the heirs of John Bill. The will was made in 1819. The testator died in 1832. George Bindon died in 1825. The plaintiffs were heirs of John Bill, who died in 1826. It is said by the court, that a "remainder created in favor of the heirs of a living person could not vest unless the ancestor died before the happening of the event on which it was to vest, because, while he should live, the persons appointed to take the estate as his heirs were unascertained. The uncertainty of his dying before the time should arrive, or event should happen, on which the remainder was to vest, was, therefore, the very contingency which characterized the estate as a contingent remainder."

The contingency in that case was, who were to be the heirs of John Bill. He having died before the testator, his surviving children were then the ascertained heirs, and took a vested remainder on the death of the testator.

In *Wilson v. Rudd*, 19 Ind. 101, the question was, whether a devisee of the will took an estate which could be levied on and sold under execution. It depended upon the construction of the will.

By the will, the testator bequeathed and devised all his estate, both real and personal, to his children and grandchildren, by name, and their survivors. In a preceding clause he bequeathed several legacies. He further directed, that in case his wife should die before him, or, should not accept the will, then his executors should sell all his real estate; but if his wife should survive him and accept the

will, then the legacies, except to the wife, were not to be paid until her decease. Immediately after her death, in case of her acceptance of the will, the executors were to sell all the real estate, pay the legacies from the proceeds so far as the personal property fell short, and divide the balance of the proceeds between his children and grandchildren. He left one son; and the question was, whether that son had, under the provisions of the will, an interest in the real estate, which could be sold under execution. It was held that he had.

It appears that there is a statute in that State, which provides in substance, among other things, that "all lands of the judgment debtor, whether in possession, reversion or remainder," shall be liable to judgments and sale on execution. The law of that State, in that respect, however, does not seem to be materially different from the laws of the States generally.

In *Cowan v. Epes*, 2 P. & H. (Va.) 520, the will provided, that the testator's widow should have the use of one-third of all his property, real and personal, during her life; and *at her death*, that it should be equally divided among his children and grandchildren, in case of the death of any of the children, leaving children before the death of the testator. The grandchildren were to take by representation, or *per stirpes*. The estate in remainder was held to vest at the death of the testator, in such of his children as survived him, and in the children of such as died before the testator; and that such estate was not liable to be divested at the death of the widow upon the contingency of their not surviving her.

This case was decided upon the authority of *Hansfor v. Elliot*, 9 Leigh, 79; where it was held that words of survivorship are always to be referred to the period of the testator's death, if no special intent of the testator appears to the contrary; and upon the authority of *Martin v. Kirby*, 11 Grat-tan, 76, where the same rule was applied. The questions involved were elaborately examined and ably discussed in each of these cases.

In *Macomb v. Miller*, 9 Paige, 265, the testator devised real and personal property to his daughter, who was his only descendant, during her life; and, after her death, to her child or children, if she should have any, and to their heirs and assigns forever. He further provided, that, in case his daughter should die, and leave no lawful issue, his executors should sell his estate, and divide the proceeds among certain collateral relatives named.

This daughter married and had one child. This child died in the life-time of its mother, intestate and without issue. The husband of the daughter, who was the father of the child, died before the child. The mother then claimed to take the property, as the heir at law of her deceased child, as against the collateral kindred named in the will; and the question was, whether the child took a vested estate under the will in question. If so, it descended to her mother, who then became the absolute owner in fee of the premises. If not, on the death of the mother, the property vested in the collateral relatives, who were made residuary legatees under the will. It was decided that this child of the testator's daughter took an absolute, vested remainder at its birth, subject to open and let in after-born children.

This case came within the rule in relation to gifts to a class, which has been before noticed.

This rule was laid down in *Hall v. Robinson*, 3 Jones' Eq. (N. C.) 348. In a conditional limitation of an estate, if the person to take is certain, his representative is entitled to the interest limited to him, although he died before the happening of the event on which the estate in remainder was to vest in possession.

This was not a new rule, but a clear statement of an old rule, and in a very serviceable form for practical use. The pertinent question, in most, if not in all cases of this class, is, is there a person living who is certain to take the possession, if he lives until the period or event, which is to limit the particular interest, arrives or happens? It is not necessary to speculate upon such person's chance of living until the period

arrives, or the event happens. The vested right of property is independent of that consideration. Whenever there is a remainder limited by the provisions of a will, or the terms of a deed of assignment, and there is any question whether it is vested or contingent, the first inquiry should be directed to the time of the death of the testator; and that inquiry should be, whether the person who is to take the remainder is then certain and fixed. If so, the remainder is vested at and from that time. If not so, the next point of inquiry is, what period or event is named, when the person who is to take is to be made certain, and who is that person? Once determined, there is an end to the question. It has not to be repeated at successive periods, or upon the happening of succeeding events. As before remarked, it embraces only one period, or one event, and not a series of periods or a succession of events. The rule is particular and exacting in this respect, so much so, that when a vested remainder is limited to a family of children, who may be thereafter born, they take as a class. If one is alive when the testator dies, all succeeding children are let in as vested of that period. If none are alive then, the remainder vests in the first one born, at birth, and all succeeding children are let in, as of the time of the birth of the first. So is the rule, as we have shown, in all cases where a remainder is limited to a class of persons.

It may sometimes happen that the remainder never vests, for the reason that the persons designated never come along; and in such case, when there is no other disposition made of the property, the estate becomes intestate. *Wood v. Keyes*, 8 Paige, 365, is an example of that kind. There was a devise of both real and personal property to a trustee, for the use and support of the testator's daughter for life, and, in case she should die leaving issue, the trustee was to divide all the estate among that issue, equally. No other disposition was made of the property by the will. The daughter died without issue. The estate was held to be intestate; that the money received by the trustee for land sold went to the heirs and not to the distributees.

In *Mining v. Batdorff*, 5 Barr, 503, there was a devise to a daughter for life, and at her decease the same to her children, "born of her body, their heirs and assigns."

At the time of the death of the testator, the daughter was alive and had children living. It was held that those children took a remainder, vested at the time of the death of the testator, which opened and let in after-born children as they came *in esse*.

In *Burnett v. Strong*, 26 Miss. 116, the general rule, as to the intention of the testator, was held to be the criterion, in determining whether a testamentary provision should operate as a condition precedent, or a condition subsequent; and that that intention was to be inferred, not so much from the particular words of the provision itself, as from the whole will.

There is very little, if any, difference in the statement of the general rules and principles of the law upon this subject, in the reported cases of the different States. There are some cases, however, where the application of those rules and principles cannot be sustained.

Van Dyke's Administrator v. Vanderpool's Administrator, 1 McCarter (N. J.) 198, is a case of that character. The rules and principles are very clearly and truly stated; but the application of them to the facts of that case are as clearly erroneous, taking the facts as reported.

There was a bequest of \$5,000 to Maria Van Dyke Gough for her life, which was to be paid to her children or grandchildren, *if she left children or grandchildren at her death; but if she died without either*, it was to be paid to James and William Vanderpool.

James and William Vanderpool died before Maria, and she died without issue.

The court held that James and William Vanderpool took a vested interest in the fund, and that their representatives were entitled to claim their respective shares.

Now, during the life of Maria Van Dyke Gough, how could it be certain that James and William Vanderpool

would be entitled to the money at her death? For, if she died leaving either children or grandchildren, they were entitled to receive the money, and not James and William Vanderpool.

It is there stated as a rule, "that where in a will there is no other gift than in the direction to pay or distribute *in futuro*, the legacy will be deemed contingent, is subject to an exception of the case, in which the payment or distribution appears to be postponed for the convenience of the property, as where the gift is wholly postponed to let in some other interest."

While that exception to the general rule may remain undisputed, how is that case to be brought within the exception? When James and William Vanderpool died, it was not certain that they would have any right to the money, and could not be made certain until the death of Maria. It clearly was not a case where it was the payment only which was postponed. The children or grandchildren were interposed, as the recipients of the money, in case there were children or grandchildren of Maria. The postponement was made to await the result of her death, not for any alleged convenience of the property, but to determine whether she would leave either children or grandchildren. The gift itself, and not the mere payment, was made dependent on that result. The contingency related only to the persons who were to receive the gift.

The remarks of the chancellor, as reported, do nothing to explain the inconsistency between the rules as laid down and the application that was made of them. He said: "Substantially the bequest is of the interest of the fund to Maria Van Dyke Gough for her life, upon her death to her children or grandchildren; and if she leave no lawful issue, over to James and William Vanderpool absolutely.

"The fact that the enjoyment is uncertain never interferes with the vesting of an estate. Where the contingency is not in the person, but in the event, or in the time of the enjoyment, the interest is vested.

"It is the present capacity of taking effect in possession, if the possession should ever become vacant while the remainder continues, which distinguishes a vested from a contingent remainder. In the former the enjoyment only is uncertain; in the latter the right to that enjoyment.

"A legacy given at or after any future specified period or event is not vested, and the legatee's right to it depends upon his being alive at the time fixed for the enjoyment."

It is clear that James and William Vanderpool were not made to await the event of the death of Maria Van Dyke Gough merely for the payment of the legacy. There was another contingency which embraced the gift itself. If she left children or grandchildren, those children or grandchildren were to take the money. This part of the contingency seems to have entirely escaped the attention of the court.

In the case of *Letchworth's appeal*, 30 Penn. St. R. 175, the testator's children were held to take a vested interest, under a testamentary provision, as follows:

"At and after the decease of my said wife, and in case she should marry, and when my youngest child shall arrive at the age of twenty-one years, then it is my will that all my estate shall be distributed by my executors agreeably to the intestate laws of this commonwealth, provided, always, nevertheless, that in case all my said children shall die without leaving lawful issue during the life-time of my said wife, then and in that case I give, devise and bequeath to my said wife all my estate, real and personal and mixed, to her and her heirs and assigns forever."

The court applied this rule: "A devise or legacy, appearing to depend upon an event that is sure to happen, is vested, if the happening of the event does not form a part of the description of the devisee; and if the suspensive expressions can be construed consistently with, or referring, not to the vesting of the title, but to the vesting of the enjoyment."

It is further remarked: "It is not a devise to such children as should be living at a particular time, but a direction for distribution among his natural heirs at a particular time."

It is evident that the first clause of this provision of the will provided merely for the distribution of the testator's estate, and indicated the events upon the happening of which the distribution was to be made. There is no difficulty in determining what period of time those events called for. The youngest child must be twenty-one, and *then* the distribution was to be made, provided the widow had before died or married. If she was neither dead nor married when that period arrived, then the time of the distribution was postponed to await the event of her subsequent death or marriage. So far the intention of the testator was very clearly expressed.

The remaining part of the provision is, however, equally clear in its expression of a contrary intention of the testator. If all his children happened to die without having issue during the life-time of the wife, then she was to have the whole, "to her and her heirs and assigns forever."

In holding that the children took a remainder vested at the death of the testator, the court entirely disregarded the latter clause of the testamentary provision, and made it impossible to be effectual; while had they held the death of the widow to be the event upon the happening of which the estate was to vest in the children of the testator, and in the intermediate time to be merely contingent, they would have allowed force and effect to both clauses of the provision.

The rules of construction laid down by the court seem to require the latter decision. The event of the widow's death did "form a part" in describing the devisee; and it was a devise where the devisee was not certain until that event happened.

The difference between those cases and the case in *Chew's appeal*, 37 Penn. St. R. 23, is obvious. In the latter case there was a devise to the testator's sister for life; one-quarter to his brother Benjamin for life; and after his death to the children of said brother and their heirs. It was further provided, that should any of the children be dead leaving children, the children of the said children should represent their parents. It was said by the court: "We think the estate vested in

remainder in the children of the brother immediately on the death of the testator;" and it was so decided.

Here it was the enjoyment only that was postponed. The right to take was made certain in the children of the brother as soon as the testator died. There was no intervening contingency upon which the persons who were to take depended.

Van Dyke v. Vanderpool was, in its facts, like *Leslie v. Marshall*, 31 Barb. 560, where the remainder was held to be contingent. There was in that case a devise to one and the heirs of his body; and in case of the death of the devisee named, without issue living, then to another devisee named.

There is an obvious distinction in the facts of those cases and the case of *Hathaway v. Leary*, 2 Jones' Eq. 264, where there was a bequest of personal property to the wife of the testator and his two children, with a provision that it was "to remain in joint stock until my children shall have attained twenty-one, then their portion to be set apart to them." One of the children died before attaining twenty-one years of age. It was held that the children had a vested interest in the property on the death of the testator, and that the representative of the deceased child was entitled to the share of the deceased.

The condition in this case related merely to the after-enjoyment of the property.

There was a similar ruling in a similar case, embracing both real and personal property, in *Phillips v. Phillips*, 19 Geo. 261.

So where there was a devise to the wife of the testator for life, and "on her death to his son A. when he arrived at twenty-six years," it was held that the son took a vested estate on the death of the testator, and not one contingent on his becoming of the age of twenty-six.

Bromfield v. Crowder, 4 Bos. & Pull. 313, is a case which fully illustrates the rule, that the intention of the testator must control the question, whether an estate is a vested or merely a contingent interest, and that that intention must

be gathered from the whole will, and not from the language of a particular devise.

There was a direction to the executors to pay Samuel Crowder, the defendant, an annuity of £50 during his life, with an express condition that, if he should at any time mortgage, sell, assign, dispose of, or in any manner incumber the same, or any part thereof, then the future payments of the annuity should cease. There was a devise to the testator's wife, Elizabeth Davenport, of all his, testator's, real estate during her life; then to Joshua Rose for life, in case he survived his wife, and then as follows: "And at the decease of Mrs. E. Davenport and Mr. Joshua Rose, or the longest liver of them, I give all my real estate to my godson, John Davenport Bromfield, if the said John Davenport Bromfield shall live to attain the age of twenty-one years; but in case he die before he attains that age, and his brother, Charles Bromfield, shall survive him, in that case I give my real estate to Charles Bromfield, his brother, if he lives to attain the age of twenty-one, but not otherwise; but in case both the above mentioned boys die before either of them attain the age of twenty-one years, then I give my real estate to John Vale, my godson, and his heirs forever."

The testator died in 1796, leaving the defendant, the said Samuel Crowder, his heir at law.

On the death of both Mrs. Davenport and Joshua Rose, the tenants for life respectively, a bill was filed by the plaintiff, the first named devisee in remainder, then an infant, praying that his right to the real estate might be declared. This was resisted, on the part of the defendant, Samuel Crowder, the heir at law, on the ground "that the plaintiff had no right or title to the said estates, or any part thereof, for that the devise to him, the plaintiff, and to the defendants, Charles Bromfield and John Vale, were contingent remainders, limited upon the estates for life devised to the said Elizabeth Davenport and Joshua Rose, and that as the preceding particular estates determined and were at an end before the events happened, on which the said premises were to become vested,

such remainders could not then take effect," and consequently came to the defendant, Samuel Crowder, as heir at law of the testator.

A case was made by the order of the master of the rolls, to obtain the opinion of the judges, whether the plaintiff took any estate, and what.

Lord Mansfield, Ch. J., in the outset of his opinion, said: "It must be admitted, that according to repeated decisions, no precise words are necessary to constitute a condition precedent in wills. They must be construed according to the intention of the parties; and it would be absurd, considering the various circumstances under which wills are made, to require particular terms to express particular meanings. The apparent intention, as collected from the whole will, must always control particular expressions."

It will be noticed that, in this case, the word "if" is used in a manner to indicate a precedent condition, if there was nothing else in the case to denote a different intention. In regard to that, it is said: "No doubt the general meaning of the word 'if' implies a condition precedent, unless it be controlled by other words."

And the court held that the plaintiff took a vested estate in fee simple, determinable upon his dying under the age of twenty-one years.

One position taken on the argument of that case, on the part of the plaintiff, was as follows: "It is a most material circumstance that the testator has expressly noticed in his will the defendant, who was his heir at law, by giving him an annuity of £50 for his life, with this condition, that if the defendant should at any time dispose of any part of it, he should cease to derive any benefit from the devise. This clause most clearly evinces the opinion of the testator with respect to the conduct and prudence of the defendant, and that he did not mean that the defendant should have his estate."

We have presented this case as an extreme example of the circumstances and considerations which have been allowed

to influence courts in deducing the intention of testator's contrary to the language of the will.

This case also presents another feature, to which we shall bestow more particular attention before we leave the subject, namely: that while the court held that the contingency of the plaintiff's attaining twenty-one years of age, was not a condition precedent to the vesting of the estate in him, it is intimated that it might operate as a condition subsequent, to divest him of the estate, should he die before he became twenty-one.

We propose to show, in its proper place, that contingencies upon which the right of an individual to an estate is made to depend, must operate as conditions precedent, if at all, and cannot be effective as conditions subsequent. The latter operation would conflict with the established rules of the common law, and with the established rules in regard to estates of inheritance in lands, in this country. It would also subvert the whole system of contingent remainders; for there is nothing in this case to make it an exception, in that respect, to contingent remainders generally; and all interests of that class, in any other case, might be construed as vested, only subject to be divested upon the happening of the contingency, with as much propriety as in this case.

Doe v. Moore, 14 East, 601, is another of the same class of decisions.

There was a devise to John Moore, *when* he attains the age of twenty-one years, to hold to him, his heirs and assigns forever. "But in case he should die before he attains the age of twenty-one years, then I give and devise the last mentioned estate to his brother, James Moore, when he attains the age of twenty-one years, to hold the same to him, his heirs and assigns forever."

The action was ejectment by the heirs at law of the testator to recover possession of the lands so devised. The devisees were then under the age of twenty-one.

The court decided that the plaintiffs, as the heirs at law, took no estate in the premises; that the first devisee, John

Moore, took an immediate vested interest on the death of the testator, liable to be divested upon his dying under twenty-one.

In the case of *Cogburn v. Ogleby*, 18 Geo. 56, the court undertake to distinguish the case of *Doe v. Moore*, and others of that character, from the case before them, in this manner. It is said: "Some courts have held, that though a devise to a particular person, if he shall live to attain a particular age, standing alone, is contingent; yet, if it be followed by a limitation over in case he die under such age, the devise over is considered explanatory of the sense in which the testator intended the devisee's interest in the property to depend on his attaining the specified age, viz.: that at that age it should become absolute and indefeasible; the interest in question is, therefore, construed to vest instantan-

"The principle here is somewhat subtle, but it rests upon the principle that, unless some immediate interest had been conveyed to the devisee, there would have been nothing to go over upon the contingency of his death before twenty-one, and the words giving the devise this direction have no meaning. Thus, it will be observed, proceeding upon the idea that there was a prior estate extending over the period for which the devise was postponed."

This explanation, impliedly, at least, concedes that the rule of vesting to be divested upon the happening of the contingency, is not generally applicable to all cases, but only to a class of cases where the donor or deviser has intimated an intention that such shall be the operation. We shall examine that proposition, whether such intention, even when plainly expressed, can be carried into effect by law, when we consider the question in another section, whether it is possible, under our system of land tenures, to so vest an estate that some future event or some condition subsequent may divest it.

Doe v. Nowell, 1 Mau. & Selw. 327, is a case similar to *Doe v. Moore* and *Bromfield v. Crowder*. So, also, is *Edwards v. Hammond*, 3 Lev. 132. The contingency, in each case, was held to apply only to the possession of the property.

Roe v. Briggs, 16 East, 412, was distinguished from that class of cases by Lord Ellenborough, Ch. J., as follows. He said: "But those cases materially differed from the present; the devisee in remainder was a person *in esse*, and the words of condition, *if* he attained twenty-one, were used only to denote the time when the estate should come into possession. Here the estate is limited, not to any persons in being, nor to any persons of whom it could be predicted for certain, that they ever would be in being, or that if they ever came into being, they would be so at the death of the testator's son *Richard*; the limitation being after the decease of his son *Richard* 'unto the heirs of the body of my said son *Richard* Clemett, lawfully begotten, or to be begotten, equally among them as shall then be living'; so that the remainder is contingent, and depends not only on the event of there being any child-or children born, but on the event of any of them being living at the death of their father; and no case has been shown where an estate, depending on such a contingency, has ever been held vested."

It would have been just as appropriate in this case, as in the others, to hold the property vested to be divested by the contingency.

In South Carolina, in the case of *Bently v. Long*, 1 Strohard's Eq. 43, there was a devise of all the testator's property to his wife for life, or until her marriage, and on her death or marriage to be equally divided between the testator's children; the children were held to take the estate as a remainder, vested on the death of the testator, and, therefore, transferable by them during the time his wife lived unmarried.

So where there was a devise to the wife for life, then to return and become a part of the testator's estate, the property was held to be intestate; and the remainder to be vested immediately in the heirs of the testator, upon his death, subject only to the life interest of the wife; and the fact that the widow was one of his heirs, by statute, was decided to make no difference with the result. She being one of the

heirs, the remainder was held to have vested in her in common with the other heirs.

Rochell v. Tompkins, 2 Gratt. 506.

The two cases last cited cannot be questioned, when tested by the general rule, that the intention of the testator must control the construction of his will.

SECTION III

CASES WHERE THE REMAINDER WAS HELD NOT TO VEST ON THE DEATH OF THE TESTATOR, SO AS TO CONSTITUTE THE REMAINDERMAN THE STOCK OF DESCENT, BUT WAS HELD TO BE POSTPONED TO A LATER PERIOD.

It should be borne in mind, that cases of this kind do not differ in character from the class of cases before examined. They differ only in the fact, that the intention of the giver is manifested in the instrument, wherein he makes the gift, to leave the contingency of some event, or some series of events, to determine which of certain persons named or indicated, shall ultimately be the objects of his bounty; which event, or series of events, may not happen until after the death of the donor or devisor. The cases are arranged in different sections, chiefly for convenience in the examination of them. The cases reported, so distinguished by the final result, seem to be fewer in number than the others. How far that may be attributable to the disposition so commonly expressed, to lean towards vesting remainders at the earliest possible time, namely, the death of the testator, may be doubtful. Nor is it material, since there is no difference in the rights of the donee or devisee after those rights are once vested, which depends upon, or is influenced at all, by the time of the vesting.

In *Hunt v. Hall*, 37 Maine, 363, the testator devised certain real estate to his wife for life, and after the death of the tenant for life, to such of his, the testator's children, as should be living at the death of the tenant for life, and to the heirs of those who should then be dead.

It was decided that the estate devised did not vest in the children during the life of the tenant for life.

The provision of the will in question was as follows: "2. After the decease of my dear wife, my will is that my executor hereinafter named cause an equal division to be made among all my children, and the heirs of such as may then be deceased, of all my property, both real and personal."

The action was in the nature of waste, and the plaintiff was met with the rule that no one except the owner of the next immediate estate of inheritance can maintain such action.

The court said: "By the terms of the will the estate is not to vest till after the death of the widow, and then the division is to ensue. Till then there is a contingency as to the persons who may take the estate."

The intention of the testator in this case might have been, at least, quite as probably inferred, that it was only the *division* of his estate that was postponed until the death of the tenant for life. Indeed, it may be said that that was the more probable intention, because that is the expressed intention of the clause of the will which postponed any part of the testator's disposition of his property.

In *Watson v. Woods*, 3 R. I. 226, there was a devise of land to a daughter of the testator for life; one-third of the same to her husband for life, if he survived her, and then to the children of the said daughter and their issue: "Provided, however, that such child or children of my said daughter Mary, or the issue of any such child or children, as at the time of her decease may be under the age of twenty-one years, shall not be entitled to the possession of the portion of the said premises, to which he or she may be entitled at the decease of the said Thomas and Mary Rivers as aforesaid (the daughter and her husband), until his or her arrival at the age of twenty-one years, but such portion shall remain in the possession of the said trustees."

The children of the said daughter were held to take no vested estate during her life, and, as a consequence, that a

conveyance made by one of the children during her life, passed no interest in the premises.

This case cannot be sustained under any of the rules of construction established in other cases. It was not the title to the land that was postponed, but only its possession and enjoyment. The language of the will was as definite in that respect as language could be; while extraneous circumstances pointed with equal clearness in the same direction. Certainly it could not be reasonably inferred that it was the intention of the testator to disinherit his children, or his grandchildren, merely because they were infants at the time of the death of their mother or grandmother. It would be attributing to the testator an unnatural intention and disposition, to withhold the means of support to his descendants, merely because they had the misfortune to be helpless and dependent for the want of age. Such considerations may well induce the parent to postpone the possession of property; but it is monstrous to infer his intention to deprive them of all right to property for such reasons. It must require the most unequivocal expression of such an intention to induce a court to give it the force of law. The only acceptable conclusion which the case admits of, is, that the decision was made with very little, if any examination and consideration of its merits, or of the rules of construction which should control.

The rule that the intention of the testator must govern was fully recognized and well expressed in *Gifford v. Thorn*, 1 Stockt. 702. The provision of the will in that case was: "I give and bequeath all the residue and remainder of my property, of every kind and description whatever, to the said William Jauncey Thorn, when he arrives at the age of twenty-one years, to him and his heirs forever."

The question submitted to the court, was whether the legatee took a vested estate immediately on the death of the testator, or, whether the legacy was contingent upon his becoming twenty-one years of age.

The court held that the legatee took only a contingent interest until he became of age; that that period was a con-

dition precedent to the vesting of the legacy; and the legatee dying before that period, the legacy lapsed.

This conclusion was arrived at, both from the intention expressed in the clause here quoted, and from the conviction produced by the entire will, that such was the intention of the testator. The subject is elaborately discussed in the opinions, and most of the earlier leading cases are reviewed. The criticisms upon the words "when," "if," etc., differ in some respects from the views expressed in the authorities before noticed. For example, authorities are cited as showing that the word "when," alone and unqualified in the gift of a legacy, denotes the time when the gift is to take effect, and not the mere time of payment.

It was said: "The intention of the testator is the pole star to guide in the construction of a will; and that intention is not to be ascertained by any particular clause standing by itself, but is to be gathered from the whole will taken together; and where the intention is manifest, if the same is not contrary to some positive or settled rule of law, it must prevail; although, to give effect to such intention, it may be necessary to depart from the literal meaning, or the strict grammatical construction of the words, which the testator has used to express his intention."

The matter of Ryder, an infant, 11 Paige, 185, is a case where the period, when the remainder vested, was fixed at the decease of the tenant for life, instead of the death of the testator. There was a devise to a married woman of the rents and profits of real estate, the remainder to her surviving children, and to the issue of such of her children as should have died leaving issue at the time of her death. The interest of the children was treated as contingent until the death of the mother.

The question whether a remainder was contingent or vested arose in *Van Tilburgh v. Hollinshead*, 1 McCarter, N. J. 32, in this way: By a will made in 1809 the testator devised that, at the death of his son William, his part of his landed property be given to his surviving children according to law. As the

law then existed in New Jersey, and as it was at the time of the testator's death, a son took twice as much as a daughter. But before the son died the law was so changed that the lands descended equally without regard to sex. The direct question was, whether the lands were to be divided by the law as it existed at the time the will was made, and when the testator died, or by the law as it existed at the death of the son. This was an important practical question, because the surviving children who were to take were of both sexes.

The decision of the question depended upon whether the real estate vested in the children at the time of the death of the testator, or not until the death of the son named in the will. If it vested at the time of the death of the testator, no subsequent change of the statute could divest it. Consequently, the practical question was, whether, during the period of time elapsing between the death of the testator and the death of the son, the children had a vested or contingent remainder. If vested, the old law governed the division of the land among the surviving children, and the sons took twice as much as the daughters. If contingent, the new statute governed, and it belonged to the sons and daughters in equal shares. The court held that the remainder was contingent until the death of the son, and the new statute governed the division.

The ground upon which the remainder was held to be contingent was, that, according to the terms of the will, only those children alive at the death of the tenant for life could take. While the tenant for life was alive, the interests of the children were uncertain and precarious, for it was impossible to say which of them, if any, would survive. So, that during that uncertainty, the interests of the children were not certain and vested.

The phraseology of the will in this case was, after a devise to his son William, "at the decease of my son William I will that his part of my landed property be given to his surviving children according to law."

It was said by the chancellor: "The limitation over of the estate upon the death of the *devisee* is to *his* surviving children, not to those who survive the *testator*, nor to the children of the devisee as a class, but to such children of the devisee as shall survive *him*. This creates a contingent estate."

The distinction between a contingent and a vested interest is clearly stated in *Snow v. Snow*, 49 Maine, 159. There was, in that case, a bequest of the testator's personal property to his widow, during her life or widowhood, she to use so much as might be necessary. After her decease, or marriage, one-half of what remained was to descend to his son Edward, and the other half to his son Isaac. It was provided that Edward should come into possession "when he shall arrive at the age of twenty-one, or at the death or marriage" of the widow. It was held that the legacy to Edward was contingent, and that if he died a minor, and before the death or marriage of the widow, the legacy lapsed and was void.

The distinction between a contingent and vested interest is stated in this way: "Where the bequest is absolute in its terms, but to be paid at a future time, it vests in the legatee, and is transmissible to his representatives if he dies before the time fixed for payment; but when the bequest is to take effect at a future time, or the same is annexed to the legacy itself, and not to the payment of it, it is contingent, and lapses by the death of the legatee before the time."

It was said by the court: "A remainder, at most, was the subject of the bequest. It depended on two contingencies: one, whether anything would remain at the death or marriage of his mother; and the other, whether he would ever attain the age of twenty-one years."

The provision that the mother was not limited to the income, but might use the principal, was significant of the intention to bestow on the son only a contingent interest. It may be properly considered as the controlling feature of that case.

Poythress v. Harrison, 1 P. & H. (Va.) 197, is a case where a bequest was held to be contingent. The testator gave his

estate to his wife for life, with remainder to three legatees, subject to the condition that the three should contribute \$1,000 to his son, to be paid at the death of his wife. There was then a provision, that if the son should die before he received the legacy, the amount unpaid should go to his sister. The widow renounced the provision in her favor, and the legatees received the greater portion of their legacies.

The \$1,000 legacy to the son was held to be contingent upon his surviving the widow.

The case of *Griswold v. Greer*, 18 Geo. 545, presents a state of facts which frequently occurs substantially, and the disposition of the case is, therefore, of importance as a precedent.

The testator devised his property to his wife for her life; at her death to his daughter in fee, "if then living, and her issue, if any; but if the daughter should at that time be dead, without issue, or afterward die leaving no issue," then to the children of several persons named.

It was held that the daughter took only a contingent remainder; and while she remained without issue, the children of the persons named had such an interest in the estate as to entitle them to an injunction against the widow to stay her from committing waste.

It was said by the court: "The record shows that the mother is still living, and that the daughter has no children. If she should thus die before her mother dies, of course the clear and definite provision in favor of these defendants in error, dependent upon this event alone, will take effect. It follows, therefore, that the interest of the daughter, Mrs. Hill, or of her estate in this property, is in the nature of a contingent remainder—a remainder resting upon the condition of her surviving her mother with issue."

"The interest of Mrs. Hill in this property is not a vested interest."

The interest of the ultimate devisees was doubly contingent. It could not become vested until the death of the daughter, and then only upon her death without issue.

Where a will provided: "I do give, devise and bequeath to my beloved daughter, Julia Maria, the wife of Benjamin Ogle Tayloe, and such her child or children as shall at her decease be living, and shall have attained, or shall thereafter attain, the age of twenty-one years," the rest and residue of my real and personal estate, it was held that Mrs. Tayloe took only a life estate, and her children contingent remainders. In the language of the court: "The estate did not vest in the children on the death of the testator; it went only to those who survived their mother and became of age. If one of them became twenty-one years of age he would still have no title, unless he was living at the decease of his mother; and if, after attaining twenty-one years of age, he married and died before his mother, leaving issue, his issue could not inherit. The remainder to the children was not, therefore, vested, but contingent."

Tayloe v. Gould, 10 Barb. 888.

The language of the will in the foregoing case leaves little, if any doubt, that the court construed the devise in strict accordance with the intention of the testator. There are cases holding the remainder to vest at a later period than the death of the testator, where it is not so clear that such intention was fulfilled.

In *Olney v. Hall*, 21 Pick. 311, there was a devise to the wife while she remained the widow of the testator, with the further provision, as follows: "Should my wife marry or die, the land then shall be equally divided among my surviving sons."

The testator left five sons at the time of his decease; but only one of the sons survived the widow. The question was whether the estate vested only in the son who survived the widow, or in the sons equally, who died before her. The court construed the provision of the will as a devise only to such sons as survived the widow; "that until her death it was uncertain who would be alive to take, and, therefore, that no estate vested in any one before that event happened;

and that, as one only survived her, the whole estate, on her death, vested in him. As nothing vested in the father of the demandant's wife, nothing descended to her."

See also *Snow v. Snow*, 49 Maine, 159; *Brown v. Brown*, 44 N. H. 281; *Moore v. Littel*, 40 Barb. 488.

The case of *Striker v. Mott*, 28 N. Y. 82, is one where the remainder was held to be contingent, so as not to pass by deed.

The testator gave all his real estate to his three grandchildren, naming them, and their heirs forever. He then directed that it should be disposed of as follows by his executors: 1. It should not be alienated. 2. The executors should rent it and pay the rent to the said heirs in equal portions. 3. There was also a provision that in case any of the said heirs and devisees should die without lawful issue, the share of the one so dying should go to the surviving devisees and their heirs forever.

One of these grandchildren died without issue, leaving a will, whereby she devised all her property. Before this, however, the grandchildren, the devisees, had procured judgment of partition of the real estate, and had executed to each other mutual deeds of release. The questions to be decided were, whether these mutual deeds of release, and the will of the deceased devisee, were valid and effective; and those questions depended on the ulterior question whether the interest or estate which each of the grandchildren took under the will was a vested or a contingent estate. The court held that the estate so devised to the grandchildren was contingent, and that, consequently, they had no estate which they could convey by deed, and none which could pass by the will of the deceased grandchild.

The court said: "The remainder, limited to the surviving grandchildren upon the event of the death of one of them without issue, was contingent and not vested. At the time of the execution of the partition deeds, it was not only uncertain when the remainder would vest in favor of such of them as should survive the others, but as the issue of the grand-

child dying was to take preferably to the surviving grandchildren, it was uncertain whether any estate in remainder would ever arise in their favor."

In another case, arising upon the same will, it was held that these grandchildren had no present legal interest which could pass by a sale under judgment and execution against them.

Brewster v. Striker, 2 N. Y. 19.

There was a devise to one Elwyn, and his heirs, upon the trusts that he should permit Mary and John Tabor to use and enjoy the same during their lives and the life of the survivor. After the death of both, one-half to the use of Harriet forever; the other half to the use of Lydia for life; after her death to the use of her children forever.

Hayes v. Tabor, 41 N. H. 521.

It was held that the remainder to Lydia during the life of John (Mary being dead) was only contingent, and that the remainder to Lydia's children, during the life of John and Lydia, was doubly contingent, and that Lydia's children (Lydia being dead) could have only a contingent remainder, and that no estate of inheritance vested in them during the life of John.

The court held that John Tabor had a life estate, and that Lydia and her children, and Harriet stood as though the estate had been devised to them after the decease of John, without the intervention of any trustee. The remainders were held to be contingent, on the ground, as stated by the court, that "as Lydia could not take her estate until after the termination of the natural life of Mary and John, if the life estate of John, the survivor, should terminate or be destroyed before his death, as it may by forfeiture, or by surrender and merger in the inheritance, the remainder, limited to Lydia, could never vest in possession in her, though she might have survived John, because, from the time when John's life estate should thus terminate, to the time of his decease, there would be no particular estate to support the remainder, and, of course, the remainder would fail. Were

Lydia alive her children's remainder would be liable to fail also in the same way, by the termination of her life estate before her death, so that their remainder would, in that case, be doubly contingent, or doubtful."

A will provided that the real estate should be rented for the benefit of certain children and the wife, until a son, one of the children, became of age, then to be sold if they saw cause, and the proceeds equally divided, a life estate being retained for the wife. Then came this provision, that if either should die before that time the whole was to descend to the survivor. One of the children died before the majority of the son named, and one died after that time. Upon that state of facts it was held that, at the majority of the son named, the property vested absolutely in the two devisees then surviving, as tenants in common.

Miller v. Keegan, 14 Ind. 502.

The majority of the son seems to have been the time fixed by the testator when the remainder was to vest, and the children then surviving were to be the parties in whom it was to vest; and so it was held by the court.

There seems to have been a statute in New Jersey, passed June 13, 1820, R. L. 774, §1, entitled an "Act regulating the descent of real estate," which was construed to make all remainders contingent where there was a devise to one for life, with remainder to the heirs of such devisee.

Don v. Demarest, 1 N. J. 525.

This would seem to have been only declaratory of the common law rule, that the heirs of any person are not determined while that person lives.

In *Roberson v. Wilson*, 38 N. H. 48, there was a devise to one for life, the remainder in fee to the oldest surviving son of the life tenant. The remainder, during the existence of the tenant for life, was held to be contingent. A quitclaim deed of the land, made by the oldest son of the life tenant before the death of his father, who was the life tenant, was held not to convey the contingent remainder.

The phrase of the will in question was as follows: "And after the death of my said son Jeremiah, I give and devise the same lands to *the oldest son of the said Jeremiah* that may be then living, and his heirs forever." Jeremiah Eastman conveyed by quitclaim deed to his oldest son, Edward M. Eastman, after the death of the testator in 1847. In 1848 Edward M. Eastman conveyed to one Wallace; in 1853 Edward M. Eastman also conveyed to the defendant.

Jeremiah Eastman died in 1854. Edward M. was the oldest son of Jeremiah, and survived his father. The question was whether Edward M. had a vested interest in the premises which could pass by his deed to Wallace in 1853. The court said: "Was the interest of Edward M. Eastman, at the time when he made these conveyances, a vested or a contingent remainder?" They held that his interest was contingent until the death of his father, the tenant for life, and, as a consequence, that his deed to Wallace did not convey the remainder. The language of the court was: "At that time his interest was contingent, and such interest cannot be conveyed by deed."

There was a similar decision in *Hall v. Nute*, 38 N. H. 442. In that case there was a devise of land to A. for life, remainder to B. for life after the death of A., remainder to the heirs of B. after B.'s death. It was held that the remainder to B. was contingent while A. continued to live; that no estate vested in B. during A.'s life-time, and that B.'s quitclaim deed made during that time did not estop B.'s heirs from asserting their claim to the remainder limited to them after the death of B. The action was a writ of entry.

The testator devised the land in question to his wife for life; after her death to the testator's son, William Tuttle, for life; after his death "to his heirs, and their heirs and assigns." In 1839, and after the death of the testator, William Tuttle made a deed of conveyance of the premises to his mother. The question was, whether this deed barred his heirs from claiming the remainder limited to them. It was said by the court: "When William Tuttle conveyed to his

mother, on the 17th of December, 1839, he had no vested estate; his deed purported to be a mere release or quitclaim of all his title and interest, and conveyed nothing. A vested remainder may be conveyed by deed, operating on the estate at the time when the deed is made, but not a contingent remainder."

Brown v. Williams, 5 R. I. 309, presents these facts: A testator devised lands to trustees for the use of his daughter Mary for life; the remainder to her lawful issue, in fee, in case she left lawful issue. If she did not, then the remainder in fee was devised to the children of his daughter, Ann Brown, not only to those then born, but to those that might thereafter be born, to be equally divided between them, or to the issue of her deceased children, which should be living at the *time of his daughter Mary's death*. His daughter Mary died without issue. The other daughter named had children, some who survived Mary, and one who did not. The daughter of A. B., who died before her aunt Mary, left a will assuming to devise the lands in question. This will was held inoperative for that purpose. She had not then a vested, but only a contingent remainder. The court said: "Now, upon reading the will of John B. Dockray, we are satisfied that he did not intend that any interest in the real estate, placed in trust for his daughter Mary for life, should vest in the descendants of his daughter, Ann Brown, until the death of Mary." The will of one of those descendants, made before the death of Mary, the tenant for life, was, therefore, held inoperative to pass any interest in the premises.

The death of the daughter Mary was the time appointed to vest the remainder, and the children of Ann, then living, were the persons in whom it was to vest.

In *Moore v. Littel*, 40 Barb. 488, the case was made to turn upon the character of an estate in land in relation to its assignability. The facts were these: Samuel Jackson was the owner of the land in question, and on the 15th day of February, 1832, made a deed of conveyance to John Jack-

son for and during his natural life, and after his decease to his heirs and their assigns.

In April, 1858, John Jackson had eleven children who, in the event of his death, would have been his heirs at law; and he then executed to those children a deed, purporting to convey the lands in question, for the consideration of \$1,000. In the month of August, immediately thereafter, those children made partition of the lands among themselves, and executed deeds to make it effective. The lot in question was conveyed to two of the sons, Parmenus and Edward Jackson, by their brothers and sisters. Parmenus and Edward then executed a mortgage to William Beard to secure \$300. The mortgage was subsequently foreclosed, and the premises were sold to the mortgagee, who afterward, in February, 1855, conveyed the lot to Moore, the plaintiff. He brought this action to recover possession of the lot in question, and his right to recover depended entirely upon the force of the deeds of partition and of the mortgage.

The defendant claimed to hold the premises as tenant of the said Parmenus Jackson, one of the said mortgagors. On the trial, the judge who tried the case decided that the plaintiff was entitled to recover as the owner in fee simple, and gave judgment accordingly. On appeal, the supreme court pronounced that judgment erroneous and ordered a new trial.

The grounds of error assigned by the appellate court are mentioned as follows:

"It was evidently the intention and object of the deed of Samuel to convey to John Jackson a life estate only; and as it was executed subsequent to the time the Revised Statutes took effect, it must be construed by the rules prescribed thereby. They expressly provided (1 R. S. 725, § 28) that, 'when a remainder shall be limited to heirs, or heirs of the body of a person to whom a life estate in the same premises shall be given, the persons who, on the termination of the life estate, shall be the heirs, or the heirs of the body of such tenant for life, shall be entitled to take as purchasers, by virtue of the remainder so limited to them.' This provision

abrogates the rule in *Shelley's case*, under which John Jackson would have held the title in fee as absolute owner, and his heirs could only have claimed by inheritance from him. He, by his deed, could only convey the life estate held by him, and as he did not die till the 5th day of March, 1861, that estate, under his deed to his children, passed and became vested in them.

"The question is then presented, whether those children had any estate or interest in the remainder during the lifetime of their father, the tenant for life. The limitation in the deed is to his heirs, and by the provisions above recited, it is declared that in such a case the persons who, on the termination of the life estate, shall be such heirs, shall be entitled to take as purchasers, by virtue of the remainder so limited to them. The term 'heirs' is thereby changed from a word of limitation to one of purchase, and a mere *descriptio personarum*, or specific designation of the individuals who, when the life estate determines, shall have the right to the possession and enjoyment of the property. Until that event ceases there is no person in existence that answers to or falls within the description or class of persons designated; *nemo est haeres viventis*; and, therefore, no persons can stand in the relation of heir, or fall within the meaning of that term, until the death of the tenant for life; and upon that event the remainder becomes vested in possession. There is, nevertheless, by the very terms of the deed, an estate in remainder, created at the time of its delivery. It is, however, one in expectancy merely, limited by the terms of the grant to take effect or commence in the possession at a future day (on the death of the tenant for life), and it is, therefore, denominated a future estate. Such estates are said to be vested when there is a person in being who would have an immediate right to the possession of the lands upon the ceasing of the intermediate or precedent estate. They are contingent whilst the person to whom, or the event upon which they are limited to take effect, remains uncertain.

"In the case under consideration, there was no person in being during the life-time of John Jackson, as before stated, who stood, or could stand, in the relation or character of heir to him, and, consequently, no one who could be said to have an immediate right of possession to the land on the termination of his life estate. Until that event it remained unknown and uncertain what persons would be his heirs and entitled to take. The remainder limited to them was, therefore, a contingent future estate."

They then decided that the estate of all the children passed except one, Fanny, who was the wife of one Baldwin, and died before her father. She left a son, Fanning Baldwin, as her sole heir at law. They held that Fanny Baldwin had a contingent estate until her death; that that estate determined by her death, and upon the death of John Jackson, Fanning Baldwin, as her heir at law, became vested with the title to that share in fee simple, as purchaser, under the deed to his grandfather, and not as heir at law to his mother; and that her covenants did not, therefore, affect the title.

They held that the plaintiff was entitled to recover eleven equal parts of the lot, the shares of the surviving children of John Jackson, but that he had no right to the share of Fanning Baldwin (the other eleventh), which had become vested in him before the defendant entered into the possession of the premises, and which was then, and has continued to be, outstanding.

That case was removed to the court of appeals by the defendant, where the judgment appealed from was affirmed. The decision of that court has not yet been reported.

There would seem to be no serious question that the children of John Jackson had only a contingent interest during the life-time of their father, who was the tenant for life. The real question appears to relate to the effect to be given to the deeds of the children, made before the death of their father; whether, at that time, they had any interest which could be conveyed by deed, and how far they might be estopped by their deeds.

That question is examined in another section.

There is a general rule for determining when a legacy is vested and when contingent, laid down in *Burd v. Burd*, 40 Penn. St. R. 182, as follows:

A legacy is to be deemed vested or contingent, as the time appears to have been annexed to the gift, or to the payment of it. If there be a separate and antecedent gift, which is independent of the direction and time of payment, the legacy is vested; if not, it is contingent.

When it is doubtful whether it is vested, or contingent, the law inclines to treat it as vested.

Where, in a will, the testator devised his estate to his wife for life, and at her death to the nephews of the testator who may be living at that time, the remainder so devised is contingent, because, until the devisee for life dies, it will be impossible to know what nephews will then be alive

Augustus v. Seabolt, 8 Met. (Ky.) 155.

The language of the will was: "I bequeath the real estate and slaves herein devised to my beloved wife during her natural life, after her death to be equally divided among the lawfully begotten children of my brothers, or *such of them as may be living at her death.*"

Time or futurity was there annexed to the gift itself.

SECTION IV.

CASES WHERE THERE IS A TEMPORARY TRUST, EXPRESS OR IMPLIED,
CONNECTED WITH THE INTEREST IN REMAINDER.

This is a division of the reported cases made also for convenience in reference, rather than because of any principle which characterizes the decisions. According to the common law, trustees are important in keeping alive the particular estate upon which the contingent remainder depends, until such time as the remainder is ready to vest. But that feature of the law and practice has no particular bearing upon the question whether the remainder is vested or contingent, or when it shall change its character from contingent to vested.

In *Cogburn v. Ogleby*, 18 Geo. 56, the will provided that the testator's property, both real and personal, should be kept together, under the management and control of his executor, for the support and education of his family; that the executor should have the privilege of selling such part of the estate as might seem best to him, either for the payment of debts or the better management of the estate; that, should his wife marry, the executor should furnish her with a comfortable and genteel support out of his property during her life; that, should any of his children die after marriage, without issue living at the time of such death, then the wife of such child should receive five hundred dollars from his estate; that, as his children should marry, or become of age, his executor should give such child such portion of his estate as he should think best, for the purpose of managing, controlling and deriving the profits or increase to himself. Then it was provided as follows: "But the title to such property shall not be divested from my executor, nor such child acquire any title to the same; but such property shall belong to my estate until the youngest child shall marry, or become of age, and then shall be brought into the general fund, to be divided among all my children equally, share and share alike."

There was a further provision, as follows: "That, should all my children die without leaving children living at the time of their death, all my property shall be made a poor school fund 'for the benefit of Putnam county.'"

One of the sons died after he was twenty-one, but before the youngest son had married, or was of age. It was held that the administrator of this deceased son could not recover any share of the estate, but that the same vested in the survivors of the testator's children when the youngest married or came of age. The name of the deceased son was Lorenzo. The court stated that the question was: "Whether the words of this will postponed the vesting of Lorenzo's share until the happening of one of the things just stated, and thus made the bequest contingent and dependent upon this event for its consummation, or whether they postponed the possession

merely until that time, but conveyed a vested interest at the death of the testator."

It was further remarked: "In the former case the share of Lorenzo may pass to the survivor of George L. Bird's children. In the latter it must go to his administrator, and is subject to the payment of his debts."

The court stated the general rules, which must govern in such cases, in accordance with the established authorities, in this manner: That, "if futurity be annexed to the substance of the gift, the vesting is suspended; but if it relate to the time of payment only, the title vests instantly upon the death of the testator."

And further: That, "where property is given by will to one when he shall attain the age of twenty-one years, or at the expiration of a definite period from the testator's death, or when that person or another shall marry, the vesting itself, and not merely the possession, is deferred, and a contingent interest is conveyed. If, however, the gift be, in the first instance, to the devisee or legatee, and is then directed *to be paid*, at the age of twenty-one, or when the event specified shall happen, then the title to the same vests immediately upon the death of the testator."

The court also assumed to make the disposition of the question before them turn upon another proposition, which they stated as follows: That "it is well settled, too, that an estate may be conveyed by will, which vests immediately upon the death of the testator, subject to be divested upon the happening of a specified contingency. Thus, in *Edwards v. Hammon*, 3 Lev. 132, where A. surrendered the reversion in fee in customary lands to the use of his son H. and his heirs, etc., if it should happen that he should live until he attained the age of twenty-one years: provided, always, and under the condition, nevertheless, that if H. died before he attained that age, then the premises to remain to A. in fee; it was held that this was an immediate devise to H., subject to be defeated upon a condition subsequent if he did not attain the age of twenty-one years."

The final conclusion is expressed as follows: "Either no estate vested in any child of George L. Bird, until the youngest child should come of age, or marry, or that, if any interest did so vest, it was subject to be divested upon the contingency of the child dying before the time specified. In either event, as Lorenzo died before the happening of the specified contingency, his representative is not entitled to recover the *corpus* of his share in such estate."

The ultimate conclusion was, that the interest of Lorenzo did not vest in him, and could not, therefore, be said to have been divested; that the vesting was to be postponed until the youngest child should marry or come of age, and that there was no title to any portion of the property of Lorenzo extending over the period from his father's death until his own.

The foregoing case seems to have been decided upon the point that the interest in question was never vested. The proposition that it might be regarded as vested, and subsequently divested, will be examined in another section, in considering other cases where that doctrine has been announced and acted upon.

This subject was discussed in *Howie v. Howie*, 7 Paige, 187, where there was a testamentary provision, as follows: that the remainder of the testator's property, after paying certain debts and charges, should "be divided equally among the children of my sister Mary, my brother Solomon, and my brother John, when they shall severally become of age."

The question, as stated by the chancellor, was, whether those children thus designated took a vested estate on the death of the testator, although they were then under age; or "whether there was an interest undisposed of during their minorities, which is now vested in his heirs at law."

On a hearing before a vice-chancellor, he had held the interest of the children to be merely contingent, depending upon the contingency of their arriving at the age of twenty-one years, respectively, and that, in the meantime, the legal estate descended to the heir at law of the testator.

To which the chancellor said: "In this I think he was clearly wrong. Even before the Revised Statutes a future estate was not contingent where the devisee was in *esse* and ascertained at the death of the testator, and where nothing could prevent the estate from vesting in possession if the devisee lived until the time appointed for that purpose. The estate or interest, therefore, which was given to the infant devisees in this case, was a vested estate, which, upon the death of the devisee under age, would have descended to his own children, or heirs at law, and not to the heirs of the testator. The estate is not given to them *if* they shall arrive at the age of twenty-one, but it is to be divided among them *when* they respectively attain the age of twenty-one."

The chancellor also expressly denied the correctness of the notion intimated in *Rogers v. Ross*, 4 John. Ch. 388, "that when the enjoyment of the estate was postponed during the minority of the devisee of the whole residuary interest, the heir at law would take the legal estate in the mean time in trust for the infant, although the infant devisee was himself in existence, and capable of taking an immediate vested interest;" and he declared the following proposition to be the general rule: That "where, from the will itself, it is evident that the testator meant that the heir at law, or any other person, should take the legal estate for the benefit of the real devisee, the court will consider the estate as devised in trust, although no formal words of devise to the trustee are used. But where it is clear that a person in *esse*, and capable of taking the legal estate at the time of making the will, was intended to have the whole beneficial interest in the estate during his minority, as well as afterwards; and there are no words in the will indicating an intention to give the legal estate in trust to another person for his use, I can see no good reason for giving the legal estate to the heir at law, as the trustee for the infant, instead of giving it to the infant himself, to be taken care of in the mean time by his legal guardian."

Let us now look at some of the older cases upon this point of the subject.

The case of *Goodtitle v. Whitby*, 1 Burr. 228, before cited, was an action of ejectment, and was made to turn upon the point whether certain devisees took a vested estate, or merely a contingent interest.

There was a devise to two persons, and the survivor of them, and the heirs of the survivor, "in trust, that they and the survivor of them, his heirs and assigns, should lay out, employ and bestow the rents and profits of the devised premises for the maintenance, education, bringing up and putting forth into the world, of Thomas and John Hayward, sons of the testator's sister, Elizabeth Hayward, during their minority; and when and as they should respectively attain their ages of twenty-one, then to the use and behoof of the said sons of his sister Hayward, the said Thomas Hayward and John Hayward, and their heirs, equally."

Thomas Hayward died before he became of age, and without issue. John, the other devisee, on becoming of age, brought this action of ejectment against Whitby, the defendant, who claimed to hold the premises as the heir at law of the testator.

Lord Mansfield said: "The question is 'whether the estate *vested* immediately in the two nephews upon the death of the testator, or *remained in contingency* till their respective coming of age;' and, consequently, 'whether this moiety belongs to John Hayward, upon the death of his brother Thomas, either as his heir at law or as survivor; or whether it descends to the heir at law of the testator, as being undevisee.'"

It was held that there was an immediate gift to the two nephews, with a trust to be executed for their benefit during their minority.

Boraston's case, 2 Coke, R. 51, is one of the oldest leading cases upon this subject, and is much cited. There was in that case a devise of lands for eight years, then to the executors for the performance of certain duties imposed upon them, until the testator's son should be twenty-one, and when he

attained that age that he should enjoy the same, "to him and his heirs." The son died before he became twenty-one. It was held that the devise to the executors, till the son became twenty-one, was valid, and that the remainder was executed in the son, and was not in contingency.

It was said, "for the adverbs *when* and *then*, in this case, only denote the time when the remainder was to take effect in possession, and not when the remainder should vest; for, when these adverbs refer to a thing which must of necessity happen, they make no contingency."

It is further remarked in that case, that "when the particular estate upon which a remainder depends, may determine before the remainder takes effect, the remainder is contingent."

This rule was founded upon the common law requirement, that a remainder could not for a moment exist without a particular estate to support it, which is noticed in another chapter. That requirement has been changed by statute in some, if not all of the States, and, consequently, the rule here referred to does not there apply.

Phipps v. Williams, 5 Sim. 44, is a case of the same character. There was a devise to trustees, in trust to convey lands of the testator, in Wheelock, to George H. Ackers, "*when and so soon*" as he should attain twenty-one; but in case he should die under that age, without leaving issue, then over.

There was another provision in favor of James Coops, that the trustees should convey certain lands to him when he should attain the age of twenty-four, and upon his giving security, to pay certain amounts as specified and directed in the will.

It was held that Ackers took a vested interest in the land, although he had not attained the age of twenty-one; but that Coops took only a contingent interest.

The court placed the distinction thus made between the two devisees upon the ground that, in the case of the latter, he was required to perform certain things, which were construed as conditions precedent. He was to give security for

the payment of certain amounts before the estate was to vest in him.

But it was said of G. H. Ackers, by the vice-chancellor, "and my opinion, therefore, is, that, by force of this devise, G. H. Ackers, although he has not attained the age of twenty-one years, does take an immediate vested interest in the estate, liable only to be divested." The interest here referred to, was not the fee, but the temporary right of possession before the fee vested on G. H. Acker's becoming twenty-one. This temporary interest is hereinafter more particularly considered in Section V, of Chapter VI.

A devise in trust to the daughters of the testatrix, during their natural lives, and then to the heirs of their bodies forever, was held to vest in the children of the daughters who were alive at the death of the testatrix, so that they took vested interests, which would pass to their representatives on their death; real estate to the heirs, and personal to their executors or administrators. *Ward v. Saunders*, 3 Sneed, (Tenn.) 387. It was said by the court, that the law favors vested remainders, rather than contingent remainders, whenever it can do so consistently with the intention of a testator; and that joint tenancies are abolished by statute in Tennessee.

This was a departure from the doctrine that the living have no heirs, and that the heirs of a person cannot be determined until he is dead. Otherwise, the children would have had only contingent interests during the life-time of their mother, because until that event happened, it was not certain that they were her heirs.

The general rule was stated in *Phillips v. Johnson*, 14 B. Mon. 172, as follows: That the title of children in whom a remainder is vested, vests in them on the death of the testator, if they are then born; if not then born, it vests in them at birth, and when one dies his part descends to his heirs.

It is said in the opinion, "The children of Mrs. Standeford, whenever born, took a remainder which vested at their respective births, if after the death of the testator, or vested

at his death in such as were then in being; and such vested remainder, on the subsequent death of any child, passed by descent to his or her heirs."

According to the rule as to heirs before referred to, there is a difference between children and heirs: the one exist as soon as born; the other, not until the death of the ancestor.

In the case of *Doe v. Cundall*, 9 East, 400, the action was ejectment, and depended upon the construction of a devise of certain premises to Robert and Rebecca, two children of the testator's brother Robert. The devise was to them "when they have attained the age of twenty-one years. But the executor shall be accountable for the profits of the said houses unto the said children until the aforesaid age of twenty-one years, or the day of marriage. But if either of them should die before the said age of twenty-one years, then the survivor shall be heir" to the premises.

There was a general residuary clause in the will in favor of a brother and two sisters of the testator.

The action was brought in favor of the heir at law of the deceased brother, who was one of the residuary devisees, against the husband of Rebecca, who claimed to be the tenant by the curtesy.

The question was, "whether Rebecca Wright, the daughter of the testator's brother Robert, after the death of her brother Robert, had an estate for life only, or in fee."

It was contended on behalf of the plaintiff that Rebecca had only a life estate, and that the fee passed under the residuary devise and vested in the lessor of the plaintiff. Robert and Rebecca, the devisees named as the children of the testator's brother Robert, were infants when the will was made and when the testator died, but both lived to become of the age of twenty-one, when Robert soon after died, leaving his sister Rebecca his heir at law.

The reader should bear in mind, that if the devise had been to the two children, without mentioning their heirs, the plaintiff's position would have been sustained, because, as the law of England then was, the devisees would have

taken each a life estate only. But there was this additional provision, that "if either of them should die before the said age of twenty-one years, then the survivor shall be heir" to the premises. The real question for the court to pass upon was, whether this last clause mentioned was an expression of the intention on the part of the testator, to give the premises in fee to the survivor.

It was contended by the plaintiff, that the word *heir*, as there used, was merely a word of substitution, and expressed only the intention of the testator to substitute one devisee in the place of the other, in case of the death of one, and not the intention to devise a life estate to each, with the remainder in fee to the survivor. The case was made to turn upon that question of intention. Lord Ellenborough, Ch. J., said, "Admitting that the word *heir*, as here used, is merely a word of substitution, still there is enough in the will to indicate an intention in the deviser, by the devise to his brother Robert's children, when they attained the age of twenty-one years, and the executors to be accountable to them for the profits in the mean time; and that if either of them died before twenty-one, the survivor should be heir to the party so dying; that the party so dying should have a fee, which should go over to the survivor in that event, or should vest absolutely in the party attaining twenty-one. Here, then, Robert, the nephew, having attained twenty-one, on his death the premises descended to his sister Rebecca, his heir at law."

This case fully illustrates the doctrine, that the intention of the testator must control, and that intention is to be made out from the whole will taken together, and not from any particular or artificial phraseology.

See *Frogmorton v. Holyday*, 3 Burrows, 1618.

A similar question was decided in Massachusetts, in *Plimpton v. Plimpton*, 12 Cush. 458. There was, in that case, a devise for life, to the wife of the testator, of the premises in question, remainder over to his son Daniel. That part of the devise was as follows: "I also give him my

dwelling-house after my wife's decease, together with one acre and a half of land adjoining."

There was also a general residuary devise to another son, Ziba.

The action was brought to recover the premises by the sons and heirs of Daniel, against a tenant in possession, who claimed title from Ziba.

The point was, whether the devise to Daniel conveyed the fee, or only a life estate, for want of the words "heirs and assigns." It was conceded to depend upon the common law rule of construction. The devise to Daniel was held to convey a remainder in fee to him. The court laid down the following as a general rule of construction: "that where land is devised to one for life, and over to another, especially to a son, without words of limitation, or any further words to express his intent, such a devise over is construed to be a fee."

It was further remarked, that "the presumption is, that such devise for life to a wife, with a gift over to a son, and without further limitation, was, in the mind of the testator, a final disposition of that part of his estate; and to effect that purpose, it must be a devise of the fee."

Barton v. Bigelow, 4 Gray, 353, is an important case as to the construction of wills which bestow remainders. There was a devise of one moiety of the residue of the testator's property to the children of a deceased sister and their heirs, to be equally divided between them. "And the other moiety of the aforesaid residue of my said property and estate, I hereby order shall be and remain a fund in the hands of my executor, during the life of my sister Elizabeth Smith, in trust, that the interest thereof be paid annually to my said sister during her life, and to the day of her decease, and that, upon her decease, the principal be paid to my said nephews and nieces, the children of my late deceased sister, Anna Smith Wellington, and their heirs, and I hereby give and bequeath the interest of said moiety of my estate and property as aforesaid, to my said sister Elizabeth, during her life,

and the principal, upon her decease, to the children of my said deceased sister, share and share alike, to them and their respective heirs accordingly."

There was a further provision, that the executor might deliver the property to the testator's sister, Elizabeth Smith, provided she gave a bond with sureties, that the principal sum, after her decease, should be paid over to the children of the other sister, Mrs. Wellington, and that they should have their remedy upon the bond. Mrs. W. left nine children, all of whom were living when the testator died. The other sister, Elizabeth, received the principal sum and gave the bond. She received the interest during her life-time, and died, leaving the children of Mrs. W. all living except one, a son, who had before died, leaving an infant daughter. The administrator of this deceased son demanded one-ninth of the sum secured by the bond, which was refused, on the ground that it belonged to the infant daughter of this deceased son; and this action was brought upon the bond for the benefit of the administrator.

The question was, whether the remainder of the moiety, the use or interest of which was given to the sister Elizabeth for life, and the principal, after her decease, to the children of the other sister, Mrs. W., became a vested remainder in said children on the death of the testatrix, or whether it was in them only a contingent interest, which vested only on the death of Elizabeth. If it vested at the death of the testatrix, it belonged to the administrator of the deceased son. If it vested only on the death of the sister Elizabeth, it belonged to his infant daughter, and not to his administrator. It was held to vest at the death of the testatrix, and to belong to the administrator of the deceased son.

There seems to have been but two positions taken in the argument against the construction sanctioned by the court; and they sufficiently appear in the opinion of the court, per Shaw, Ch. J., as follows:

"Much stress is laid, in the argument in favor of a contrary construction, on the circumstance that the intimated

gift in remainder, after giving the interest for life to the sister, is to the nephews and nieces, *and their heirs*. But the same phraseology, precisely, is used in the direct gift of a moiety to the nephews and nieces, and their heirs. Can it for a moment be contended that this direct gift, without the intervention of a trust, or any life estate, or any particular estate, is a gift to the first taker for life, with remainder to the heirs of the first taker? No authority, we think, would countenance such a construction. The phrase, to "one and his heirs," being sometimes necessary to give an absolute estate in real property, and often used when not necessary, is not unfrequently used by conveyancers, perhaps without much consideration, to designate an absolute estate in contradistinction to an estate for life or years. Having used it in the first clause, which is clearly a direct and absolute bequest to the first takers, in their own right, we think it was used in the same manner in designating the remainder expectant on the termination of the life estate. The vesting of the remainder depended on no contingency; the event of the decease of Mrs. Smith merely fixed the time of payment.

"Nor does it make any difference, that the direction in the first instance was to make this last moiety a fund in the hands of the executor, in trust to pay the interest to the sister during her life, and then the principal, that is, the entire fund, to the nephews and nieces, 'and their heirs,' using the term, as before, to distinguish an absolute from a particular estate. Even if the trust were held to continue till after the decease of the sister, so that the rights of these legatees would be, technically, equitable and not legal, they would come to the person who would take the legal rights."

The authorities seem to concur in but one general rule upon the subject of this chapter; and that is, that the intention of the party who created the interest or remainder must control the question, whether the estate or interest is to be treated as vested or contingent at any particular period.

It was remarked by Chief Justice Marshall, in *Smith v. Bell*, 6 Peters, 79, that "notwithstanding the reasonable

ness and good sense of this general rule, that the intention shall prevail, it has been sometimes disregarded. If the testator attempts to effect that which the law forbids, his will must yield to the rules of law. But courts have sometimes gone further. The construction put upon words in one will has been supposed to furnish a rule for construing the same words in other wills, and thereby to furnish some settled and fixed rules of construction which ought to be respected.

“We cannot say that this principle ought to be totally disregarded, but it should never be carried so far as to defeat the plain intent, if that intent may be carried into execution without violating the rules of law. It has been said truly, 3 Wils. 141, ‘that cases on wills may guide us to general rules of construction, but unless a case cited be in every respect directly in point and agree in every circumstance, it will have little or no weight with the court, who always look upon the intention of the testator as the pole star to direct them in the construction of wills.’”

CHAPTER V.

EXECUTORY DEVISES; ORIGIN OF AND WHAT THEY ARE; DISTINCTION BETWEEN AN EXECUTORY DEVISE AND A CONTINGENT REMAINDER; RULES OF CONSTRUCTION.

SECTION I.

CONSTRUCTION OF THE WORDS "DYING WITHOUT ISSUE."

SECTION II.

WHEN "OR" SHOULD BE READ "AND," AND "AND" "OR."

The term *executory devise* has been treated as only another name for contingent remainders. It is defined by Kent as "a limitation by will of a future contingent interest in lands, contrary to the rules of limitation of contingent estates in conveyances at law. If the limitation by will does not depart from those rules prescribed for the government of contingent remainders, it is, in that case, a contingent remainder, and not an executory devise." 4 Kent, 263.

There is, however, a substantial difference between a contingent remainder and an executory devise. A contingent remainder is that part of an estate in fee bestowed conditionally upon one of two or more persons, which one is not certain; the rest of which is bestowed definitely upon some other person or persons named. The part not thus definitively disposed of to some particular person or persons, is provided to go to some other person or persons of two or more named, which of the two or more is left uncertain, and is to be fixed and made certain by succeeding events. The remainder itself is certain, but the person who is to have it is uncertain until it is determined by the events named. In other words, the estate in fee is divided into two parts; the one a particu-

lar estate, less than the whole, devised to a person or persons named and certain ; and the other, what remains after the particular estate, devised to some one or more persons not certain, but to be made certain by succeeding events. An executory devise does not undertake to divide an estate. It assumes to bestow the whole upon some certain person or persons, subject to some prescribed contingency or condition, upon the failure or happening of which, it is to go to some other person or persons indicated. Instead of dividing the estate in fee and bestowing it for a certain period upon one person and for the residue of the time upon some other person, it bestows the whole ultimately upon some one or more of certain persons designated, whereof subsequent events are to determine which. In other words, it is an alternative disposition of the whole estate in fee upon one of two or more persons, leaving it to contingent events or precedent conditions to determine which.

It is not consistent with the design of this work to treat of this subject in its full extent and in all its details. The examination here will be necessarily limited to that class of questions which concern the right of the persons designated to take, as to when they so take the estate of inheritance as to constitute them the stock of descent.

It may, however, aid in understanding the subject, to bear in mind, that executory devises originated in violation of the feudal law, and are in conflict with some of its established principles ; but still they came from the desires and efforts of land proprietors who favored the entailments of the feudal law. When the commercial interest had succeeded in making estates in fee in land a matter of commerce, then the feudal interest was allowed to encroach upon that commercial freedom to a limited extent. Executory devises were one of the contrivances designed to effectuate the encroachment. It was a part of the rebound of the anti-feudal revolution. The land interests were still zealous in their efforts to so tie up their estates that they could not be sold or incumbered by their posterity. Perpetuation was the policy of

the feudal law. Circumscribed in its full ambition, it was willing to accept of limited favors in that respect. If it could not tie up the lands forever, it would tie them up as long as possible.

Blackstone says : " By executory devise, a fee or other less estate, may be limited after a fee, and this happens where a devisor devises his whole estate in fee, but limits a remainder thereon to commence on a future contingency." 2 Bl. Com. 173. That phraseology is liable to beget an erroneous impression. The inference might be drawn, that a fee could be created by a devise ; and that two or more fees might exist in the same premises, whereas no estate can be created except by a lease. In that respect, estates in fee do not differ from estates for life, or for years ; and in this country, as in England, since the statute *quia emptores*, there can be but one estate in fee in the same premises, at the same time. It is absurd, therefore, to talk of limiting a fee upon a fee. That would be subinfeudation. An executory devise creates no estate. It is only the testamentary alienation of an estate in fee to some one or more of two or more persons, without prescribing which ; but naming conditions or events to determine which one of those named or indicated shall finally take the estate.

The feudal law had effectuated such results by making it a part of the contract of lease, under which the lands were held, that some particular heir named—usually the oldest son—should succeed to the estate on the death of every tenant in fee, and by withholding from each tenant, successively, the right to divert the estate from the particular line of succession named, by alienation or otherwise. The lands were thus kept in the hands of comparatively few proprietors, whose numbers could not be much, if any, increased. The great mass of the people were excluded from connection with the land, except as they might be permitted to hold as the tenants or vassals of the few proprietors, and subject to such services and burdens, as might suit the pride and interests of the one class of parties to impose on the other.

Such arrangements divided the population of the kingdom into two classes, a ruling class and a subject class; and were contrived to perpetuate the division through successive generations upon one unchangeable line. Thus there was organized, as a political institution, an aristocracy, limited in numbers, exclusive in privileges, and hereditary; and so organized as to represent and fulfill the most perfect measure of political and social conservatism. The very organization, in all its lineaments, instead of being merely attached to persons who were perishable and changeable, was impressed on the land by the contracts, which, by their terms, were intended to be as enduring and imperishable as the land itself; and which would have been as imperishable as the land, had all the elements of that peculiar political organization been congenial to the associations and conditions wherein they were for a time forced.

But this feudal arrangement was not allowed to continue undisturbed beyond a few generations. The common people in time grew rich by their industry and the arts of commerce. They also gained in intelligence as they gained in wealth. The land proprietors became indolent and extravagant. They often felt the want of more money than they could realize from the yearly profits of their lands. Hence the right to sell and alien their estates, and to incumber them, as security for money loaned, was felt to be a necessity. The more extravagant and improvident became willing to sacrifice the rights of their posterity to their own more selfish indulgences, by so relaxing the feudal restrictions that they might appropriate to their own use the land itself, instead of merely its yearly profits.

On the other hand, the commercial classes were comparatively rich in money, and as they became rich, they became ambitious to own land. It was the established avenue to political importance and social respectability. There was then no other highway open to political powers and honors.

In short, the one class had land and wanted money; and the other had money, and wanted land. This combination

of interests and wants produced efforts to break down the restraints of the feudal organization, so that land could be sold for money, and like other kinds of property, become matter of commerce.

The commercial progression, which thus originated in the mutual wants and necessities of the two classes, finally achieved a marked success in the enactment of the statute *quia emptores*, in 1290.

See Bingham on Real Estate, 106 *et seq.*

From that time estates in fee in lands, became the subject of commerce, as the general rule; that is, every tenant of an estate in fee, thereby acquired the right to sell and assign his estate; while he was, by the same statute, disabled to lease in fee.

There was another branch of legislation of an opposite character, which, only five years before, had culminated in a statute, generally cited as the statute *de donis*, 13 Edw. I, chap. 1, passed in 1285. This act was designed to establish estates tail, upon a foundation which should be beyond the mischievous disposition of the courts to disturb. The provocation that led to the enactment of this statute, was the decisions of the courts that a lease of land, limited to some particular heir to the exclusion of all other heirs, was changed to a lease limited to heirs generally, the moment the particular heir designated was born. The argument of that class of decisions was, that an estate tail was a conditional fee; and when the designated heir was born, that condition, being fulfilled, was wiped out of the contract; and the fee, at once, became absolute and simple. In other words, the contract of lease, which by its terms conveyed land to the lessee, and the issue, or some particular issue of his body, became a conveyance to him and his heirs generally, as soon as the issue designated in the lease to take, was born.

See Bingham on Real Estate, 23 *et seq.*

The statute *de donis* was intended to prevent the courts from defeating the intention of the lessor or grantor, in such

cases, by the peculiar legerdemain of logic here referred to, or otherwise. It merely required that they should give effect in such leases or grants, as in others, to the clearly expressed intention of the grantor or lessor.

But the entailments here referred to, and the restraints upon alienation, which were removed by the statute *quia emptores*, were not, like the entailments of more modern days, effected by the restraints upon alienation imposed by contingent remainders and executory devises. Up to that time, at least, the restrictions and limitations as to the descent of estates in land, were to be found only in the provisions and limitations contained in the contract of grant or lease, under which the land was held; and in the laws which gave force to those provisions and limitations. Neither contingent remainders nor executory devises were then known. They embrace a kind of interest unknown to the feudal law. As executory devises could be created only by wills, and as wills were first sanctioned in England by the statute of wills in 1540, 32 Henry VIII, chap. 1—about two and a half centuries after the enactment of the statute *de donis* and the statute *quia emptores*—the period of executory devises cannot be regarded as extending back much further than that time. They cannot, therefore, claim an antiquity of much more than three centuries. If they seem to be older, it is because they were begotten of the same iniquitous parentage as feudal entailments, and partake of the same iniquitous character.

In order to obtain a familiar understanding of an executory devise, it is important to have a clear idea of the position of the devisor, what he has to give, what intention is expressed by him, and what will be the practical operation of giving effect to his intention. The devisor must be the tenant in fee of the land which he seeks to dispose of; that is, he must be the party of the second part to the contract of grant, of which the State is the party of the first part. To make the matter more readily comprehensible, let us take a case where the devisor is the immediate grantee of the State. The

grantee of the State has vested in him and his heirs the right to the possession and use of the land conveyed. That grant is a contract, of which the State is the party of the first part, and the grantee named and his heirs are parties of the second part.

See Bingham on Real Estate, 8, *et seq.*

Should the grantee die while he remains such party, intestate, his heirs would succeed him in the possession, as being also parties to the same contract. That would have been unavoidable at common law; for it should be remembered that alienation by a tenant was not a common law right, neither while living, nor after death, by testamentary disposition. But the right to name some person or persons who shall take the place of the tenant in fee on his decease, to the exclusion of the heir, who is a party to the contract of grant by its very terms and legal effect, is now the right of every tenant in fee who has sufficient capacity to make a will, by reason of the statute of wills and statutes of like character, in all the States of this country. We have thus shown, in a summary manner, the position held by a deviser, and what he may have to bestow by way of devise.

It is evident, that all he has in land that he can devise, is his contract right of possession; and all the bestowment he can make of that is, to name or designate the person or persons who shall succeed him as the parties of the second part thereto, instead of leaving it to those persons whom the law designates as his heirs; and to name his successors, subject to the determination of conditions and events.

The same disposition, manifested in the entailments of the feudal law, is again exhibited in testamentary alienations by tenants in fee, as well as in alienations *inter vivos*. They have still continued their efforts to so tie up their estates, that those who succeed them could not sell or incumber, and so that creditors could not reach the property or appropriate any part of it to the payment of the debts of the tenant; and the law has indulged this disposition to a limited extent, by allowing the tenant to create remainders, and contingent

remainders, which have been already noticed, and executory devises, which are the subject of this section. In this way, tenants in fee have been allowed to approximate, in tying up their estates, to the system of entailments formerly created by the conditional leases of the feudal law; and the position in which property in land has been regarded as placed by remainders, contingent remainders and executory devises, has not always been distinguished from the entailments of the feudal law, in the adjudications of the courts.

It is true, that similar results and similar conditions of property are sought by the one mode, that distinguished the other. But there is a manifest and wide distinction in the origin and foundation of the two systems. Feudal entailments were created by contracts of lease. The party who had a right to lease in fee, made a lease, wherein it was mutually agreed between the lessor and the lessee, that the lessee and some particular heir of his body, and so on, of each succeeding tenant, should possess and enjoy the premises forever. Such was the contract under which the land was held.

Under the more modern system, the limitation is not found in the grant or contract under which the land is held. Take the case, already instanced, where the tenant is the immediate grantee of the State. This grant or contract of the State is to the grantee and his heirs. There is no other limitation. Now, if the grantee dies leaving a will, wherein he devises the land, as in *Anderson v. Jackson*, 16 John. 382; one parcel to his son J., and his heirs and assigns forever; another parcel to his son M., and his heirs and assigns forever; with a provision that if either of his said sons should depart this life without lawful issue, his share or part shall go to the survivor; and, in case of both their deaths without lawful issue, then to a brother and sister of the testator, he diverts the estate in the land from his heirs by an executory devise.

A devise like the one here stated, was held to be a good limitation over; and that J., one of the first devisees named,

having died without issue, and consequently having failed to fulfill the contingency that was to give him the fee, had no estate in the land devised, which was liable to be sold on execution against him; and of course none which could descend to his heirs. He failed to become the party of the second part to the grant of the State which constituted the estate in fee; and consequently failed to become the stock of descent therein.

But for the contingency attached to the devise to him, he would have taken the fee; would have held the estate with the right to alien at pleasure; his creditors could have sold it under judgment and execution against him; and dying intestate, his heirs would have been his successors in the estate.

The contingency, however, and the devise over so qualified the devise to him, that he did not become the owner of the fee. His was only a life interest, subject to be enlarged so as to take the fee at the moment of his death leaving issue. Dying without issue, the fee never vested in him, but passed to his brother under the devise over. In J.'s hands, it was like an entailed estate in effect, although not so in name. In the language of Chancellor Kent: "When an executory devise is duly created, it is a species of entailed estate to the extent of the authorized period of limitation. It is a stable and unalienable interest, and the first taker has only the use of the land or chattel pending the contingency mentioned in the will." 4 Kent, 270.

But we have pursued the subject far enough to show that, notwithstanding the similarity in results between the two kinds of entailments, there is a wide dissimilarity in their origin and in the foundation upon which they rest. The one results from the terms of the agreement under which the land is held. The other results from a change made in the terms of the agreement under which the land is held, made by one of the parties to that agreement, to take effect on his ceasing to be a party by reason of his death.

There is another peculiarity connected with limitations by executory devise, namely: that kind of limitation seems to have been practiced only upon estates in fee which had been created by grants directly from the crown or from the State. In case of an individual grant in fee, if such a thing could be, where the statute *quia emptores* prevails, it may be doubtful whether the grantee or tenant could be allowed to change the terms of the contract of lease, without the consent of the grantor or party of the first part to the contract. It is only where the State is the party of the first part to the grant, that such a privilege seems to be allowable to the party of the second part. The State may then be regarded as assenting to the change in the contract, as made by the devisor, as was the case in another respect, in the *Duke of Cumberland v. Graves*, 7 N. Y. 305; where the grant was held to be so changed, that the lands could continue to be held by non-resident aliens, on the ground that the laws of the State permitted their acquisition by aliens, at the time they were sold and conveyed to a non-resident alien. The very fact that the State, by its laws, permitted its tenants to so change the terms of the contract, and the consequent tenure of the land, may be construed as an assent on the part of the State, as the party of the first part to the contract, to the alteration made by its tenant, the party of the second part. But where individuals are parties of the first part, as well as parties of the second part, to a lease in fee, when such a thing is possible, there, certainly, the one party could not change the terms of the contract and the tenure under which the estate was held, without the consent of the other party.

See Bingham on Real Estate, 99, 100.

Having glanced at the origin and history of executory devises, and at some of their peculiarities, we propose now to examine the leading, incidental questions, which have heretofore excited much of the attention of courts, and which are most likely hereafter to be vexed questions in the administration of the law.

SECTION I.

CONSTRUCTION OF THE WORDS "DYING WITHOUT ISSUE."

Few matters in the law have been so much the subject of litigation and judicial discussion, as the construction of the words *dying without issue*, when applied as a limitation to the devise of an estate in fee.

The question has been confined to a single point, namely: whether the testator intended a definite failure of issue, or an indefinite failure. In other language, whether those words, or equivalent expressions, were to be construed as importing a failure of issue at the death of the devisee, to whom they were applied, or, as importing a failure of his descendants or posterity, at any time in the future.

There is no difficulty in understanding the meaning and operation of a definite failure of issue. An indefinite failure may not be as readily comprehended, without some explanation. Chancellor Kent, in *Anderson v. Jackson*, 16 John. 399, has defined the term as follows: "A general or indefinite failure of issue is a proposition the very converse of the other, and means a failure of issue whenever it shall happen, sooner or later, without any fixed, certain, definite period within which it must happen. It means, when the issue, or the descendants of the son, shall become extinct, without reference to any particular time, or any particular event."

The general question, as to the validity of an executory devise, turns upon the decision of the question, whether, in such case, the phrase *dying without issue*, means a definite or an indefinite failure of issue, in this way: If the words are to be construed as meaning a definite failure of issue, the limitation over is a valid one, and will be operative in case of the failure of issue by the first taker. If they are to be construed as meaning an indefinite failure of issue, the result is clearly stated by Chancellor Kent, in the decision last cited, page 400, as follows: "An executory devise upon

such an indefinite failure of issue is void, because the period when the contingency, on which the remainder over depends, must happen, is too remote or uncertain. Such an executory devise might tie up property for generations, and lead to a perpetuity, or property perpetually unalienable."

It would be equivalent, in that respect, to the entailment effected by the feudal lease, to the lessee and some particular issue of his body. No other issue or person could take, because no one else would become the party to the contract. All others would be excluded by the very terms of the contract.

Anderson v. Jackson, before cited, is a leading case in New York, upon this subject; wherein the authorities, and the principles upon which they are founded, are very fully discussed and criticised on both sides. It may be truly said that, in that case, all the previous decisions upon the question there involved, were passed in review.

There was a devise to the testator's son Joseph, of certain lands, to have and to "hold unto the sole and only proper use and behoof" of the said son, "his heirs, executors and administrators and assigns forever," "in as full, large, ample and beneficial manner, to all intents and purposes whatsoever," as the testator, if living, could hold and enjoy the same.

There was also a devise to the testator's son Medcof, of other lands, in the same absolute and unqualified language. The phraseology of the two provisions, in that respect, was precisely similar.

There was then a qualifying provision, applicable to both sons alike, as follows:

"*Item*: It is my will, and I do so order and appoint, that, if either of my said sons should depart this life without lawful issue, his part or share shall go to the survivor; and in case of both of their deaths without lawful issue, then I give all the property aforesaid to my brother John and my sister Hannah."

After the death of the testator, in 1798, his son Joseph took possession of the land so devised to him; and, in 1802, the

premises were sold on an execution against him, and conveyed by the sheriff to the purchaser, who took possession under the deed. In 1804, the purchaser sold and conveyed the premises to Anderson, the plaintiff in error in the case, who entered and took possession. Joseph Eden died in 1813, and his brother Medcef brought this action of ejectment against Anderson. In the supreme court, the plaintiff was adjudged to recover, on the ground that Medcef Eden took the premises as executory devisee. The case went to the court of errors, where the judgment of the court below was affirmed; but the court was divided.

Chancellor Kent and Senator Hammond delivered very elaborate and earnest opinions for reversal, and eight senators concurred with them. Senator Yates delivered an opinion for affirmance, and thirteen senators concurred with him. So the case was affirmed by the numerical majority of four of the members of the court.

The opinion for affirmance was placed chiefly, if not entirely, on the authority of *Fosdick v. Cornell*, 1 John. 439; *Jackson v. Blansham*, 3 id. 292; *Moffat v. Strong*, 10 id. 12, and *Jackson v. Staats*, 11 id. 337.

The case of *Fosdick v. Cornell*, and the other cases relied upon on that side of the question, decide no other point, important to be here considered, than the one that the words *dying without issue* mean a definite failure of issue, when used as a limitation for a devise in fee, accompanied by a devise over.

Chancellor Kent, who was chief justice of the supreme court when the case of *Fosdick v. Cornell* was decided, and who assented to the decision therein, but dissented from the decision in *Anderson v. Jackson*, in his dissenting opinion, said: "I discovered years ago that the case of *Fosdick v. Cornell*, was decided upon mistaken grounds. The court, however, have this apology for themselves, that without much examination and without looking as they ought to have done deeply into the subject, they were led astray out of the beaten track by such a distinguished leader as Lord

Kenyon. The case of *Porter v. Bradley*, 3 Term, 143, and of *Roe v. Jeffrey*, 7 id. 589, were the blind guides that misled them."

Lord Kenyon expressed the opinion, in the cases referred to, that the testator had intended, in using the words *dying without issue*, a definite failure of issue, and the court decided accordingly.

But to return again to *Anderson v. Jackson* and the words *dying without issue*, as there used. The question whether the first taker took an estate of inheritance, which would descend to his heirs in the event of his dying intestate, turned in that case upon the same point that it must turn in every like case, namely: upon the question whether the words of the devise would have created an estate tail at common law. If they would, then the first taker would take a fee absolute, and the executory devise would be void. The question was thus stated by counsel on one side, page 386: "If the devise, in this case, means without issue living at the death of the devisee, then it was a conditional fee at common law, and the devise over is good, by way of *executory devise*. But if the words mean an *indefinite failure of issue*, then the devise over is not good, the contingency being too remote; and Joseph E. took an *estate tail* which by the statute, is converted into a fee simple absolute."

That presentation of the question was concurred in by the counsel on the other side and by the court; and accords with the view taken in most, if not all, the cases.

The ideas are covered up with the technical language of the feudal law, and need to be somewhat denuded of their artificial covering, in the mind of the reader, in order to be relieved of a kind of obscurity which does not legitimately belong to them.

In that case, as in every other, where like questions arise, the testator was the tenant in fee of the State; and as such tenant was the party of the second part to the lease in fee which created the tenancy; and the State was the party of the first part. The tenant was seeking to do what he had a right

to do, by the laws of the State; to designate and name the parties who should succeed him on his decease, as tenants of the estate, in lieu of his heirs at law, who otherwise would succeed to him in the tenancy.

Among the designations made, was a devise of a certain farm to his son Joseph Eden, and to the heirs and assigns of Joseph, forever. If the will had stopped with Joseph, there, he would confessedly have fully succeeded his father in the tenancy of the farm devised, upon the decease of his father. He would have become the owner of the farm in fee absolute, so that he could have sold it or mortgaged it; and the sale under the judgment against him would have passed the title to the purchaser.

The testator did not, however, stop there, but added this further provision; that if Joseph should die without lawful issue, the farm should go to his brother, Medcef, if he was then alive, and if dead, to others in the will named.

The question was whether the will of the testator, as expressed in the latter clause, should be allowed to qualify his will, as expressed in the former clause. If so, then Joseph became a tenant, upon condition only, that if he died without issue, his right to the tenancy ceased. The tenancy itself did not cease, as in the case of a base or qualified fee, but only his right thereto. The condition or qualification was annexed only to the testamentary assignment to him; not to the estate itself. The estate was an estate in fee simple, when the will was made and when the testator died; and its character underwent no change because Joseph died without issue. It was only Joseph's right to the estate that was to be affected by the failure of issue. And whether it was affected or not, was the question before the court.

It was conceded by all parties, that the intention of the testator in that regard, as in all other cases, must control the decision of the question. The majority of the judges rested their decision directly upon that point. It is said, in their opinion, per Senator Yates, page 435, "Now, no one can hesitate for a moment, as to the meaning of the testator in

the case before us. He clearly intended, that if either of his two sons should die without lawful issue, the survivor should take the whole which was devised to both; and the only question is, whether there is any inflexible rigid rule of law to wrest the plain and manifest intention of the testator to a purpose altogether different from what he intended."

That was a clear and fair statement of the question; and was so accepted by the minority of the court. They met the question upon that ground. Their point was that the words *dying without issue*, had been held to mean an indefinite failure of issue, through a course of decisions in England extending back to the very beginning of the reports; and that, consequently, those words had been held to create an estate tail. The rest of the argument was unanswerable. Estates tail were not only abolished by the New York statute, but were declared to be fees simple absolute. Therefore, if the words *dying without issue*, indicated the intention of the testator to create an estate tail, as they held they did, then the statute defeated that intention by changing that estate tail to a fee simple; and the qualifying words of the testator were without any meaning at all, in the eyes of the law. In legal effect, they expressed no intention whatever.

The argument with which that side of the question is enforced in the reported decision, is presented with a wealth of legal learning, and an energy of expression, not often surpassed and seldom equaled. The foundation upon which it rests, is the long line of decisions holding that the words *dying without issue*, create an estate tail. That is not denied. But those decisions were made when and where estates tail could be created.

The fallacy of the argument is, in holding that that line of decisions has worn a rut so distinct and deep, that whoever uses the words *dying without issue*, in a testamentary disposition of his estate, must be regarded as having fallen into it; and to have intended to create an *estate tail*, even where estates tail have not been permitted to exist within

the life-time of the testator. It seems absurd to attribute an intention in such case to do what is well known to be impracticable by law ; and is certainly a manifest departure from the uniformly established rule in the construction of wills, as we have shown, while treating of contingent remainders, that the intention of the testator, as gathered from the whole will, read in the light of attending circumstances, must be allowed to control ; and that particular phraseologies must yield to that intention.

It was claimed, on each side, that property to a large amount would be disturbed by a decision contrary to the views expressed by each ; and each party seemed to appeal to the prejudices which were assumed to exist against the anti-commercial policy of the feudal law.

Both sides agreed in this, that the intent of the testator should control. Starting from that point, and aside from any previous decisions, the force of the argument is all on one side. The one party contended, that the testator meant by the words *dying without issue*, an indefinite failure of issue ; which, at common law, would have created an estate tail, but which the statute had changed into a fee simple. That being so, the devise over was void, both for remoteness and for repugnancy. Hence the first taker had a fee absolute, which passed to the purchaser on the sale under the judgment and execution against him in his life-time. This construction left the devise over out of the will, and made the testator insert it without any intention at all ; for if such was the legal effect of the words he used, he must be supposed to have known it, and to have used them accordingly. If we assume otherwise, we must attribute to him a different intention ; and it is conceded that his intention is the law of the case.

On the other hand, construing the phrase *dying without issue* to mean a definite failure of issue, as the majority of the court did construe it, we give to the devise over a purpose and its effectuation. The intention of the devisor is then allowed to be just what his language plainly bespeaks.

The decisions upon this point are not uniform in the different States, although the majority of the cases seem to hold to the construction of a definite failure of issue, in like cases.

The case of *Anderson v. Jackson* was the subject of comment in *Lyon v. Burtis*, 20 John. 486 ; and it was remarked by Spencer, J., "that the devise to Joseph Eden did not create an estate tail, but that the devise over upon the event of his dying without issue was a limitation over, as an executory devise, to Medcef, the survivor."

The rights of the first taker were held to be a base, qualified fee, and not a fee simple, in *Clafin v. Perry*, 12 Mass. 425. There was, in that case, a devise to a daughter of the testator and her children ; to the daughter, one-third of the premises, in case she became a widow and so long as she remained a widow ; and the residue equally to her children.

The question was, what the estate of the children was, in the part of the premises thus conditionally devised to their mother. It was decided that the children took immediately, on the death of the testator, a base, qualified fee, in that part of the premises, determinable on the event of the mother surviving the father.

In that case, as in many others, the practical operation of the provisions of the will, will appear quite simple, when the legal construction is expressed in plain and direct language. The testator was the party of the second part to a grant or contract of the State, whereby he enjoyed the possession and profits of a certain parcel of land. The State was the party of the first part to the grant or contract. The testator's heirs were also nominally parties to the same contract, of the second part thereto ; and in case he had died intestate, while he remained such party, his heirs would have succeeded him in the possession and enjoyment of the land. But he preferred to bestow the right of possession otherwise, and the laws of the State permitted him to do so by a testamentary expression of his choice. He virtually said, the children of my daughter shall succeed me on my decease, as the parties of the second part to this contract,

and shall enjoy the possession and profits thereof, except that their mother shall, if she become a widow, enjoy the possession and profits of one-third of the premises, while she remains a widow. Stated in that way, there is no difficulty in understanding what rights the children took, and what right might devolve on the mother in case she survived her husband. The complexity of the case is to be found only in the extremely artificial but misapplied language of the feudal law. It was not true, in any legal sense, that the children took a base or qualified fee in one-third of the premises. They took the same fee the testator held, and that was a fee simple. They became parties to the same contract of grant or lease. The fact that it was bestowed upon them, subject to a contingent and temporary provision in favor of their mother, did not change the tenure of the land. The grant or contract of the State, which created and kept in life the only fee which existed in the premises, was not changed or affected by that provision; much less could it change it from a fee simple to a base or qualified fee. That provision affected only the right which the children took in the estate, and not the estate itself.

The language of the opinion is, "If their mother should die before the father, then their qualified fee becomes absolute. If the mother should survive, the life estate to her commences; and the remainder, expectant upon her decease, immediately vests in her said children, the grandchildren of the devisor."

From the artificial language so used, the student might be induced to believe that this devise had created a base or qualified fee, and also an estate for life; whereas, it created no estate at all, but merely provided for the possession and enjoyment of a pre-existing estate in fee by different persons, and for different periods of time, successively. The estate in fee remained unchanged during the whole period necessarily embraced by the provisions of the will. The will did not operate on the estate itself, but merely upon the parties who were to enjoy it. The children took the estate in fee, subject to be temporarily interrupted in the possession of the prem-

ises, in favor of their mother, if she became a widow, and while she remained a widow. The court only beclouded the matter by improperly resorting to the terminologies of the feudal law.

In *Harris v. Smith*, 16 Geo. 545, there was a devise of real property to A., with the further provision, that should A. "die leaving no lawful heirs," then and in that case, all the property shall be divided, share and share alike, between the children of B.

The decision was that A. took an estate in fee, subject to an executory devise over to the children of B. in case A. should die without issue living at the time of his death.

A different construction is given in Pennsylvania, where a testator devised his real estate to his wife for life, and then as follows: "After the decease of my said wife, I give, bequeath and devise all the aforesaid real estate, above described, to my son Peter and daughter Catharine, to them and their heirs forever, share and share alike, equally to be divided between them; and it is my further will, that should my son Peter not marry and have lawful issue, then the said real estate shall go to my said daughter Catharine, and her heirs forever."

It was held that the words of the will created an estate tail in the son, and not an executory devise in favor of the daughter and her heirs, and that the limitation over was void for remoteness.

Vaughn v. Dickes, 20 Penn. 509.

Moffat v. Strong, 10 John. 12, is also a case which involved the construction of the words "dying without issue."

The provisions of the will were as follows: "If any of my sons aforesaid should die without lawful issue, then let his or their part or parts be divided equally among the survivors, unless it should happen that he or they so dying should leave a wife behind, in which case, she shall take back what she brought with her, and £100 besides, and only the remainder shall be divided as aforesaid."

This case involved merely the right of property in a promissory note, and related only to personal property.

The distinction between real and personal property in this respect, is considered, and the conflicting cases are noticed.

Chancellor Kent, then chief justice of the supreme court, justified his decision upon this point, as follows :

“ Every executory devise is, as far as it goes, a perpetuity ; that is, it is an unalienable interest. The devisee has only the use, and not an absolute interest, in the personal property devised.”

He then notices some exceptions in favor of a *bona fide* holder of negotiable paper, and of a purchaser of chattels in good faith of the first taker. But otherwise, he seems to make no distinction in this respect, between real and personal property. The words were construed to mean a definite failure of issue, and the gift over to be valid.

The case of *Guernsey v. Guernsey*, 36 N. Y. 267, presents some unusual features of the same character. There was a testamentary provision as follows :

“ I give and bequeath to my children, Polly Thompson, William G. Guernsey and Lavinia Guernsey, all my estate real and personal, to be equally divided between them, share and share alike.” Then, in conclusion, was a qualifying provision as follows :

“ The above devises to my children being to them, their heirs and assigns, and if either die without issue, then to the survivor or survivors in equal shares.”

The testator died in 1843, leaving the said three children surviving. Polly Thompson died in 1847, leaving seven children surviving. The will was made in 1837.

There was a grandson of the testator, William B. Guernsey, who does not appear as a party to the action, and who is mentioned in the reported case as a person who was to take nothing by the will, because he had received his portion by donations from the testator during his life-time.

The action was commenced for a partition of the real estate devised as before stated ; by the surviving daughter, Lavinia, against her brother William G. Guernsey and the children of her deceased sister Polly.

The court held that one of the children dying leaving an heir, such heir took absolutely the estate of its parent, but could not be deemed to be included in the term "survivor or survivors," as used in the will; that on the death of one of the three without heirs, the remaining child living took such share.

The court expressly decided what estate each of the devisees took under the will, as follows: "It is, therefore, undeniable, that each devisee took a fee absolute in an undivided third part of the testator's real estate. If nothing more had been said in the will, this would have been the final disposition of the estate; and, in the event of either of the devisees dying intestate, his or her share would have descended to his or her right heir."

It is further held, that "by the death of Mrs. Thompson, leaving issue, one share has passed absolutely to her children, and but two shares are now subject to the contingency of survivorship; and upon the death of either of the two survivors the share of the one so dying will vest absolutely in the survivor. This was manifestly the plain intent of the testator. It is so clear that further argument or elucidation seems unnecessary."

It is not apparent, from the case as reported, what the real question was; and nothing appears in the opinion to show what was decided, except what is before quoted, "that each devisee took a fee absolute in an undivided third part of the testator's real estate;" and yet, on the death of one of two survivors without issue, "the share of the one so dying will vest absolutely in the survivor."

The case may have been properly decided, but the two propositions announced in the opinion are utterly in conflict with each other. If the first takers each took a fee absolute, there was no possibility that, on the death of either without issue, the devise over to the survivor could operate. All the authorities concur in holding that an executory devise, limited upon a fee simple, is invalid and inoperative. In *Anderson v. Jackson*, and other kindred cases, the point of

conflict has been whether the first taker took a fee absolute or not. If he took such estate, it is universally conceded that the executory devise over was void. After a devise in fee absolute any devise over is void for repugnancy, as will be shown before we leave the subject.

Hall v. Chaffee, 14 N. H. 215, is another of the leading cases in this country, which was made to turn upon the construction to be given to the words *dying without issue*, as used in a devise of land. The phraseology of the will in that case was, "If the said Huldah Chaffee should die without issue born alive of her body, *to heir her estate*, in that case it is my will and pleasure, that she should have the use and occupancy of the premises aforesaid during her natural life; but that after her decease the premises should revert back to my estate, and be equally divided between my daughters H. and B."

The judges concurred in holding that the intention of the testator, as expressed in the will, must control the construction; and that the language of the testator in this case, clearly expressed his intention to mean a definite failure of issue; that is, a failure of issue at the death of the first taker. But they discussed the question as to the proper construction of the words *dying without issue*, when those words stand alone to indicate the intention, without other words to qualify their meaning. Upon this general question, the members of the court differed, one holding to the construction of an indefinite failure of issue, and two to a definite failure. Elaborate opinions were delivered upon both sides of the question, wherein all the previous cases are reviewed and criticised.

Fennal v. Ford, 30 Geo. 707, embraced a similar question; and was construed as constituting a valid limitation over in favor of the survivors. The language of the condition was, should either of my children die before arriving at age, or without issue, their share to be equally divided between the survivors. This was held to mean a failure of issue at the death of the children respectively.

Lillibridge v. Ross, 31 Geo. 730, is a case also holding the same rule of construction in regard to the meaning of the phrase *to die without issue*. The cases were generally reviewed upon both sides of the question, and the doctrine of construing such expressions as meaning a definite failure of issue, was very decidedly proclaimed as the established law of Georgia.

Lumpkin, J., concludes his review of that question as follows :

"Having been cheered by our statute by a glimpse at fairy land, let us not unbidden plunge again amidst the disheartening gloom of *Preston on Estates*, *Fearne on Remainders*, to say nothing of *Coke*, *Plowden* and the *Year Books*. Technical rules are binding in questions of property, and we cannot supersede them. But, following, in this case, the irresistible impulse of our judgment, and sustained, as we think, by common sense, let us not be tempted to plume our wings for another flight to the clouds, in search of occult lore, for grounds to say, what we know was the will of Abner Ross shall not be his will."

The same ruling was had in *Forman v. Troup*, 30 Geo. 496. The decisions both of England and of this country are generally reviewed in that case.

The courts in New York, however, have not been entirely uniform in their rulings upon this point, even since the decision in *Anderson v. Jackson*.

In *Patterson v. Ellis*, 11 Wen. 260, it was held that "where the words of a limitation over of *personal property* are such as would create an *estate tail* in the legatee, was real estate the subject of the limitation, the gift to the first legatee is absolute by operation of law, notwithstanding the manifest intent of the deviser to the contrary ; that such intent, being in contravention of the settled rules of law, must yield to the law."

It was not pretended that the rule was there different as to real estate. It was said, page 279, "The proper words in a grant or devise to convey directly an *estate tail* are to the

grantee and the heirs of his body lawfully begotten. Such a devise in England of land would convey an estate for life in the grantee and the inheritance to his children. Such a devise there of chattels would convey to the grantee the absolute property. The law in both cases abhors perpetuities. A perpetuity in lands may be barred by a fine or a common recovery, but not so as to personal property; and therefore it cannot be prevented but by declaring that such a devise gives the absolute property. In this State such a devise of lands would, by force of our statute, convey an estate in fee simple, and as to personal property here, such a devise must be governed by the rules of the common law. It seems to be well settled also that a devise of land for life, in fee simple, with a devise over if the devisee die *without issue*, or without leaving issue, shall be a devise in tail to the first devisee."

The chief point of the case is thus stated in the opinion of Savage, Ch. J., who delivered the prevailing opinion: "The appellant says that this expression, 'without leaving lawful issue,' means *an indefinite* failure of issue, or, in the language of the statute *de donis*, if her issue fail. The respondents say that the language used means without lawful issue at the time of her death. If the appellant's construction be the true one, he should prevail, and the decree of the court of chancery be reversed; if the respondents are right, they must prevail, and the decree be affirmed."

The decision of the chancellor was reversed by the vote of the three supreme court judges, and thirteen senators. Nine senators voted for affirmance. This decision was made in 1833.

The supreme court of the United States, in *Jackson v. Chase*, 12 Wheat. 153, followed the decision in *Anderson v. Jackson*, on the ground that that decision settled the law upon the point in question, for New York; and that it was so far a local question, that the decisions of the State courts must be allowed to control. The decision involved the construction of the same will which was the subject of decision

in *Anderson v. Jackson*. See also *Waring v. Jackson*, 1 Peters, 570. It will be found, by a reference to the decisions upon this subject, that there has been a constant dispute in regard to the authority of some of the older English cases. The one side have contended that they were authority for the construction of the words *dying without issue*, to mean a definite failure of issue; and the other insisting that that conclusion was reached by the intention implied from other language used. Those cases have been so differently understood as to demand an examination by the student.

Pellis v. Brown, Cro. J., 590, is a case often cited, and has been regarded as a leading case. The testator in that case devised land to "Thomas, his son, and his heirs forever, paying to his brother Richard twenty pounds at the age of twenty-one years; and if Thomas died without issue, living William, his brother, that then William, his brother, should have those lands to him and his heirs and assigns forever, paying the said sum as Thomas should have paid."

Thomas entered, and suffered a common recovery, to the use of himself and his heirs; and afterward devised to the wife of Edward Pellis, the plaintiff, and her heirs. Thomas died without issue, leaving his brother William living.

The devise over to William was held to be good as an executory devise; that Thomas did not take an estate tail, but took the fee, limited to dying without issue in the lifetime of his brother William. The expression, "living William," was held to control.

Porter v. Bradley, 3 Term, 146, another leading case of the same character, turned upon the expression, "leaving no issue behind him." This was held to indicate the intention of the testator to mean a failure of issue at the death of the testator, and not an indefinite failure, in like manner as the expression, "living William," was held to indicate a like intention in *Pellis v. Brown*.

A testator devised to his widow the use of certain lands for life, and then to his son and his heirs and assigns forever. He then inserted in his will a provision, as follows: "But

if my said son should die having no children, then my will is, and I do dispose of my property in the following manner." Then followed a provision bestowing it upon others. The son died after becoming twenty-one, and without issue. It was held that the son's estate became absolute on his arriving at twenty-one, and the clause assuming to give it to others was void.

Pennington v. Van Houton, 4 Halst. Ch. 272; *Van Houton v. Pennington*, id. 745.

The chancellor disclaimed the application of cases and artificial rules, as tending more to embarrass than aid in determining what the intention of the testator had been; and proclaimed his duty to be to ascertain the intention from the provisions of the will; and he held that the son's estate became vested and absolute on his becoming twenty-one. He read the provisional clause, with an additional provision inserted, that if the son should die under twenty-one, having no children, then the property to go to the others named.

It seems difficult to reconcile this case with the rule which requires the intention of the testator, as expressed in the will, to govern. There was no manifestation of an intention in the testator, such as is attributed by the court, as the case is reported. The construction seems to have been arbitrary. The court might, with as much propriety, have interpolated any other provision, as the one that "if the son should die under twenty-one years of age," so far as the facts appear in the reported case.

In New Jersey, before the statutes of that State changed the rule, the phrase *dying without issue*, when applied in a will to qualify the interest of a devisee in land, was construed to import an indefinite failure of issue.

Condict v. Ring, 2 Beasley, 875.

So in *Ridgley v. Bond*, 18 Md. 433, the words "should die without issue" were held to mean an indefinite failure of issue, and the devise over in that case was consequently pronounced void.

So also it was held in *Dallam v. Dallam*, 7 Har. & J. 220. The contrary construction was adopted in Kentucky.

Nenally v. White, 8 Metc. 584.

And also in Ohio, in regard to the words "should die without any legitimate heirs," a definite failure of issue was held to be intended.

Niles v. Gray, 12 Ohio St. R. 320.

Similar words were construed to mean a definite failure of issue, and the devise over to be valid in *Grumon v. Raymond*, 1 Conn. 36, and in *Armstrong v. Armstrong*, 14 B. Monroe, 383.

A contrary construction was applied and the devise over held void in *Nott & McCord R.* 69, and in *Daridge v. Chaney*, 4 Har. & McHen. 393.

The word *survivor* has been sometimes held to control the meaning of the phrase *dying without issue*, so as to require it to be read without issue living at the death of the first taker, and to prevent the devise over from being void for remoteness. It was so held in *Cutler v. Doughty*, 23 Wend. 513.

It is there remarked that "the word survivor, or the like, qualifies the technical or primary meaning of the words *dying without issue*, being considered the same as if the testator had added *living at the time of his death*."

There are many other cases on each side of the question, not here cited. But from an examination of all the cases, we think it is safe to assert, that, as a question of authority, the phrase *dying without issue*, when applied as a limitation, was appropriate language to create an *estate tail*; and did create such estate, where estates tail were permitted to exist.

But where estates tail are not allowed to exist, the balance of the authorities is clearly for construing that phrase and equivalent expressions, to mean a definite failure of issue; and to constitute a valid limitation for a devise over as an executory devise.

The result is not different when the common understanding of words and phrases is consulted. Where estates tail are permitted to exist, the person using the phrase, *dying without issue*, in the manner of the cases before referred to, may very reasonably be understood to intend an indefinite failure of issue; and where custom and a long line of decisions have sanctioned such construction, should be so understood. But where estates tail are prohibited by statute, it seems absurd to read such phraseology as intending an indefinite failure of issue, because such a construction practically denies any intention at all in the use of the words; while if we consult merely the rules of syntax, the phrase just as appropriately indicates a definite failure of issue. Viewed in the light of principle, the argument is decidedly in favor of construing the phrase to intend a definite failure of issue, wherever, as in this country, estates tail have been abolished.

Parties to this contest, on both sides, concede the general rule, that the intention of the donor or devisor, as expressed by him in making his gift or devise, must control its construction. Starting from that conceded principle, the argument is, on the part of those who contend that *dying without issue* means an indefinite failure of issue, that such was appropriate language in England to create an estate tail; that estates tail are not allowed to exist here, but are by statute made estates in fee absolute. Therefore, the devise over upon such a limitation is void, and the first taker acquires the estate absolutely.

In arriving at that conclusion, it is necessary to assume that the donor or devisor, in making his devise to one person, and upon that person dying without issue, devising over to another, intended to give the first devisee named the estate absolutely, and did not mean to give the second devisee named any estate whatever, or any chance to have any by the devise.

The argument in favor of that construction, necessarily disregards the expressed intention of the devise over; and the only excuse or authority for it is, the alleged fact that the

English authorities have established it as a rule, that the words *dying without issue*, applied as a limitation to a gift or devise, constitute an estate tail. It is claimed that the legal meaning of those words is so fixed, that whoever uses them must be held to intend precisely what the courts have decided that they mean in England.

That argument loses all its force where the statute has abolished estates tail. It is absurd to attribute to a person the intention to create an estate tail, where estates tail are abolished, when the language used by him calls for no such construction

SECTION II.

WHEN "OR" SHOULD BE READ "AND," AND "AND" "OR."

When "*or*" is to be read "*and*," and "*and*" "*or*," has so often been regarded as embracing an arbitrary, independent rule of construction, distinct from rules applicable to other words and phrases, that it seems to demand a distinct examination. It will be found that there is no good reason for supposing that there is any such peculiarity in the words, or in either of them, or in their use, as to require any other or different rules of construction from other words. If they hold a more prominent place in the discussions of lawyers and in the expositions of courts, in connection with remainders and executory devises, than other words, it must be due to their frequent use and the frequent demand of judicial determination, whether the conjunctive or disjunctive word comports most nearly with the true expression of the intention of the party using the word, as that intention is manifested by other words and by attending circumstances. It is undoubtedly true that few, if any, other words in the English language have so frequently been the subject of judicial exposition as the two, of themselves, insignificant words, "*and*" and "*or*."

The first of this class of cases seems to be *Soullé v. Gerard*, Cro. E. 525. There was, in that case, a devise of land

to one of four sons, with a provision, that if he died *within the age of twenty-one years, or without issue, then* the land should be equally divided between his three brothers. This son married and died before he was twenty-one, but left issue, a daughter. The contest was between the three surviving brothers claiming by the executory devise over, on the one side, and the daughter claiming that her father took a vested estate in fee, on the other side. It was decided that the deceased son took a vested estate which descended to the daughter.

On the one side, it was contended that the qualifying provision, "that if he died within the age of twenty-one years, *or without issue,*" prescribed two contingencies, upon the happening of either of which, the estate passed over to the three brothers; and as one of the contingencies did happen, namely, death within the age of twenty-one, the three brothers took the estate. On the other side, it was contended that there was but one contingency intended, upon the happening of which the remainder was to vest in the three brothers, namely: that the one should die within the age of twenty-one and without issue; that the provision must be fulfilled in both its parts, that is, there was required both the death of the one son within the age of twenty-one and a lack of issue, before the remainder could vest in the three brothers; and that the death within the prescribed age was not a fulfillment of the contingency, because the deceased son left issue.

The court adopted the last named construction, and gave judgment accordingly.

The absurdity and inhumanity of charging the testator with the intention of leaving his grandchild penniless, because her father died before he was twenty-one, was reason enough for the decision.

Price v. Hunt, Pollexfen, 645, was a similar case. The chief difference was, that the devisee died after he attained the age of twenty-one, but left no issue. The devise was to the son in fee, with a devise over depending on the contingency of the death of the son before the age of twenty-one,

or without lawful issue. The second devisee brought ejectment against the heir at law of the first devisee, claiming that the son having died without lawful issue, although married, the contingency had happened which made the devise over operative. The court held otherwise and gave judgment for the defendant.

Fairfield v. Morgan, 5 Bos. & Pull. 38, was a case of the same character. There was a devise to Benjamin Smith of certain lands, with provision, that in case he "should die before he attains the age of twenty-one years, or without issue living at his death, then to the mother of the testator forever." Benjamin Smith died unmarried and without issue, but passed the age of twenty-one years. It was contended on the one side "that the devise over to the testator's mother was made to take effect upon either of two contingencies; that is, either in the event of her son Benjamin dying under twenty-one, which did not happen, or in the event of his dying without issue living at his death, which did happen, and, consequently, that the happening of the latter contingency is sufficient to entitle" the mother to recover. On the other side it was contended that the devise over to the mother was upon one contingency, consisting of two branches, namely: the contingency of her son Benjamin's dying under twenty-one, and without leaving issue; and that in this view the latter part of the contingency having happened, and the former branch being now impossible, the devise over to the mother could not operate.

In deciding the case, Lord Mansfield said: "The question depends upon the effect of the word 'or,' whether it is to be taken disjunctively, or as if the conjunction 'and' had been used. The estate is given to his mother in case his brother died before twenty-one, or died without issue. If it was necessary for both these events to happen, of course she would only be entitled to it upon their happening. A great deal of ingenious argument has been employed to show that this word 'or' could not be construed as 'and,' so as to make it necessary that both the events should happen to entitle the

widow; but, on the other hand, in cases very similar, a great number of instances were cited, in which the same word 'or' has been determined to be used in a conjunctive sense; and so it must here in order to comply with the intention of the testator.

"The contrary construction would make the devise as absurd as could be well imagined. The testator gives all his estate in the most general way to his brother Benjamin, by which he would take, not a limited interest, but the whole absolute interest. But this would be an estate for life if the word 'or' were to be used disjunctively; and if it were to be so construed this consequence would follow, that Benjamin could never have had the real use of the property, though the testator gives it to him. He could neither have sold or mortgaged it, let his family have been ever so large, for unless he had issue living at the time of his death, the mother would be entitled, so that he would never have had the absolute estate. Besides this, if a different event had happened from that which took place, if an event *vice versa* had taken place, and Benjamin had had children, and had died a day before he attained the age of twenty-one, those children could not have taken or been at all benefited by the estate, but it must have gone over to the mother. The idea of a deviser giving an estate to a brother, to enjoy it during the life of the mother, who was likely to die before her son, and to make a will to exclude the issue of his brother, is so absurd and improbable, that it is next to an impossibility to impute such an intention to him."

The court decided that the mother took no estate in the premises, but that it vested in the brother.

In *Johnson v. Simcock*, 6 Hurl. & Nor. 6, there was a devise as follows:

"As to my real estate, if my daughter dies before she arrives at lawful age, *or* have no lawful issue, then I leave my real property to my brothers J. and D. H. equal between them. But in case my daughter shall have lawful issue, then I leave the whole of my property, real and personal, to her and her heirs, assigns and executors forever."

The daughter became of age, married and settled the property on her husband, and then died, never having had issue.

It was held that she took an estate in fee as soon as she became of age; and that consequently the devise to J. and D. H. never took effect.

There was a difference of opinion among the judges, but the majority concurred in holding as above. The question was, whether the word "or" was to be read as used, or whether "and" should be substituted in the place of it. The majority of the court decided for the conjunctive reading.

Jackson v. Blansham, 6 John. 54, turned upon a like rule of construction. There was a devise to six children, to be equally divided between them, with a provision that if any one of them should die before arriving at full age *or* without lawful issue, his part should go to the survivors. One of them died without issue, but after becoming twenty-one. The question was, whether the estate vested in him so as to pass by his mortgage. The court held that it vested; that *or* must be read as *and*, relying upon the English cases before noticed.

It was remarked in this case by Kent, Ch. J., that "the decision of *Fairfield v. Morgan* was considered as closing the controversy forever.

"It is now to be hoped that the question on the construction of those words in a will, will never hereafter be revived. It is important that when a question of this kind has become once settled, that it should not be disturbed, for it grows into a landmark of property."

The obvious inference from these remarks of the court is, that it was a fixed rule of construction that "or" was always to be read "and," when so used in a will, independently of the intention of the testator. How else could the question there discussed be regarded as closed, never thereafter to be revived? But that view of the question is absurd, as we shall presently see.

The same principle of construction was sanctioned in the New York court of appeals, in *Roome v. Phillips*, 24 N. Y. 463. There was a devise of land, in that case, to a child, qualified by the words of the devise as follows: "After the decease of my father; *and* when he, the said child, shall become twenty-one years of age, *and* become married, and has children, *and* in case of his, the said child's, decease before that period, *and* after my father's decease, then the said real estate" was given over to other persons.

The child to whom the devise was made had attained the age of twenty-one, but had never been married; and, of course, the other events had not happened. The question was, whether this child took a vested estate by the devise, or only a contingent one. It was held that he took a vested interest at the death of the testator, subject to be divested only on his dying under the age of twenty-one.

The court, in this case, also expressed regret that such a question should be regarded as an open one. Davies, J., in giving the opinion of the court, said: "It is to be regretted that after the rule has been settled and recognized in this State for fifty years, that it should be again reopened for discussion. We think the rule, as thus settled, should be adhered to, and that in all cases *or* is to be taken for *and*, and *and* is to be taken for *or*, as may best comport with the intent and meaning of the grant or devise. We think the intent of the testator is clearly deducible from the whole tenor of this will, that his son was to have the estate absolutely on his attaining the age of twenty-one, and that it was not suspended until he became married and had children. We think, therefore, in this case we may read the word '*and*' before the words 'become married,' '*or*;' and then the estate has become absolutely that of the plaintiff's intestate, and a good title can be made to the defendant thereto."

It seems difficult to conceive what rule is there referred to, which is so well settled that it should never again be reopened for discussion. The rule that "*or*" may be read

"and," and "and" "or," whenever the manifest intention of the testator requires it, has never been disputed. The question which has arisen for discussion in the past, and is quite likely to arise in the future, concerns merely the application of that rule. Whether the rule is applicable to any particular case, may be open to discussion, where the intention of the testator is not otherwise very clearly manifest; and there is no way to prevent such discussion except to establish it as a rule that "or" shall always be read "or," and "and" "and;" or else the converse, that "or" shall always be read "and," and "and" "or," either of which as an arbitrary rule would be equally absurd. But so long as the intention of the testator, as gathered from the whole will, is permitted to control particular words, instead of being controlled by them, so long the question what the intention was, must be open for discussion in each case.

Wells v. Wells, 10 Mo. 193, involved the construction to be given to the word "or." A testator had six children by his first wife and six by a second wife. He gave small legacies to the first six children, and the residue of his property to the last six, with this qualification as to the last six: "That should either of the said six children die before they come of age or unmarried, the property of such deceased child to be equally divided between the survivors." One of those children, a daughter, married before she attained the age of twenty-one, and died before that time, leaving no issue. The question submitted to the court was, whether the child's portion went to her surviving brothers and sisters of the whole blood only—that is, the five survivors of the last six—or whether it went to the first six equally with the survivors of the last six. It was held that it went equally to the children of the half blood and of the whole blood.

The decision was put upon the construction of "or" in the limitation over.

In the opinion of the court it is said: "The intention of the testator must be collected from the will itself. In cases of ambiguity, the circumstances under which a will is made,

have been received to explain it ; but this is never permitted when there is no doubt or in order to raise a doubt.

"But for the clause in the will which has been recited, it is clear that the land in controversy would have been inherited, in part, by the children of the half blood. If they are excluded it must be by the limitation above expressed. The limitation over to the surviving children, by the last marriage, was in the event of any of them dying under age or unmarried. The child, whose portion of the real estate is sought, in part, by her brothers and sisters of the half blood, did, it is true, die under age, but not unmarried. There were two events, either of which would free the estates of the children by the last marriage from any contingency, namely: the dying under age or marrying. I know not on what principle the limitation on a child's estate would be continued after a marriage, under age, until his majority. Such a construction would, in the event of a child's dying under age, leaving children, exclude them from the inheritance, which surely could never have been intended. The clear implication from the will is, that by attaining a majority or marrying, the estate of a child was freed from any limitation, and became absolute."

A like rule of construction was adopted in *Tennell v. Ford*, 30 Geo. 707; and in *Sayward v. Sayward*, 7 Greenl. 210.

CHAPTER VI.

MATTERS INCIDENTAL TO REMAINDERS AND EXECUTORY DEVISES, NOT BEFORE EXAMINED.

SECTION I.

A REMAINDER, AT COMMON LAW, REQUIRES A PARTICULAR ESTATE TO BE CREATED AND TO EXIST AT THE SAME TIME.

SECTION II.

THE PARTICULAR ESTATE MUST BE SO CONSTITUTED AS TO CONTINUE TO EXIST UNTIL THE CONTINGENT REMAINDER SHALL BECOME VESTED.

SECTION III.

THE LIMITATION UPON WHICH A CONTINGENT REMAINDER DEPENDS MUST NOT BE TOO REMOTE. THE SAME RULES APPLY TO EXECUTORY DEVISES. WHAT IS MEANT BY REMOTENESS. THE RULES THAT GOVERN IN THAT RESPECT, AND THE PERIODS OF LIMITATION ALLOWED. REPORTED CASES AND AUTHORITIES EXAMINED.

SECTION IV.

THE DEVISE OVER MUST NOT BE REPUGNANT TO THE PRECEDING DEVISE. WHAT IS MEANT BY REPUGNANCY. EXAMPLES OF THAT CHARACTER AND THE DECISIONS THEREUPON EXAMINED AND CONSIDERED.

SECTION V.

THE PERIOD OF LIMITATION; HOW MEASURED; THE ULTERIOR LIMITATION; THE PARTICULAR LIMITATION; FIXED BY CERTAIN CONTINGENCIES OR CONDITIONS; WHAT MUST BE THEIR CHARACTER; MUST OPERATE AS CONDITIONS PRECEDENT TO THE VESTING OF THE ESTATE OF INHERITANCE; CASES AND AUTHORITIES CONSIDERED.

FIRST. THE ULTERIOR LIMITATION, BY WHAT PERIOD FIXED.

SECOND. THE PARTICULAR LIMIT, HOW DETERMINED.

THIRD. THE CONTINGENCY OR CONDITION MUST OPERATE AS A CONDITION PRECEDENT TO THE VESTING OF THE ESTATE OF INHERITANCE, AND CANNOT BE MADE TO OPERATE TO DIVEST THE ESTATE AFTER IT IS ONCE VESTED.

SECTION VI.

CAN A CONTINGENT REMAINDER CONSTITUTE THE PARTY TO THAT INTEREST THE STOCK OF DESCENT, UNTIL THE REMAINDER HAS BECOME VESTED BY THE HAPPENING OF THE CONTINGENCY? CASES AND AUTHORITIES UPON THAT QUESTION EXAMINED AND REVIEWED.

SECTION VII.

THE RULE IN SHELLEY'S CASE. WHEN IT APPLIES. ITS EFFECT.

The subject of descents does not properly embrace all the rules and principles peculiar to remainders and executory devises. So far as the subject of descent is concerned, the lawyer has only to ascertain whether the intestate, in any given case, was the owner of an estate of inheritance at the time of his death; and, if the alleged estate was not one in possession, but in remainder, or depending upon the contingency of an executory devise, the inquiry is, whether the intestate's interest had so vested at the time of his death as to constitute him the absolute tenant of the estate, and consequently the stock of descent. Many of the nice questions connected with contingent remainders and executory devises are not necessarily within the scope of the inquiry, or, at least, are not of so much importance to inquiries of this character as to call for special notice in a treatise of the laws of descent.

There are, however, some things not yet considered, which may embarrass the student in his application of those laws, unless he has some general, if not familiar, knowledge of them. Peculiarities of that kind are to be the subject of this chapter.

SECTION I.

A REMAINDER, AT COMMON LAW, REQUIRES A PARTICULAR ESTATE TO BE CREATED AND TO EXIST AT THE SAME TIME.

It is a rule of the common law, that every contingent remainder of an estate of inheritance must have a particular estate to support it. This particular estate is, of course,

necessary to constitute even a vested remainder, for without the particular estate there would be no remainder. The owner of what is the remainder, so long as the particular estate exists, becomes the tenant in possession, so soon as the particular estate terminates. The owner of a vested remainder in fee is the tenant of the estate in fee, as well during the existence of the particular estate as after its termination. The particular estate during its existence prevents him from enjoying the possession of the land. It does not otherwise qualify his right of property in the land. His estate is called a remainder, because of the particular estate which intervenes between his property in the land and the possession of the land. But it is not otherwise changed than in name and in the right to immediate possession of the premises by placing before it the particular estate; and it will not be otherwise changed by the termination or extinction of the particular estate than to leave it a tenancy in possession.

But such is not the case with a contingent remainder at common law. The very existence of that kind of interest, while it remains contingent, depends upon the existence of the particular estate. It cannot subsist without it. Consequently, unless there is a particular estate, the tenant of which has a right to the possession, there could be no contingent remainder at common law; and the particular estate was required to be a freehold estate.

For example: In *Goodright v. Cornish*, 1 Salk. 226, there was a devise of land to the testator's son John, for fifty years, if he should live so long, and after that to the heirs male of the body of John. This devise to John's issue was held to be void, because there was no freehold estate to support it. See also 2 Bl. Com. 165; 2 Cruise Dig. 285; 4 Kent. 233.

The feudal reasons for this rule were found in the necessity for livery of seisin in order to vest a remainder. The estate in remainder, according to the feudal law, could not be transferred to take effect in the future, without an intervening estate to take effect in possession immediately; and

this intervening estate must be of the freehold class, because no other permitted of the ceremony of livery of seisin. Delivering possession of the particular estate was regarded in the law as delivery of the possession of the remainder, on the ground that both constituted the same estate in law. They were both parts of the same lease. The livery of seisin could not be made directly to the remainderman, for that would destroy the particular estate; and a remainder in pos-

A. conveys in fee - grants a life estate to B. remainder ^{in fee} to C. provided he marries A's niece before the death of B -
Two estates

1. A. particular estate of B.
2. Conditional remainder in fee to C.

Contrary to the

life to B. until C. marries A's niece - Only one estate - the death of B's estate terminates the remainder

In 1606 v. Drury, 10 East, 410, it is said, "where a contingent remainder is created out of a common fee-simple

estate, it must have a previous estate of freehold to support it; and the destruction of every such previous estate, before the remainder vests, destroys the remainder." The two exceptions to that rule are there mentioned, as before stated, and are called remainders of subordinate fee simple estates, where the contingent remainder is "supported by the ordinary fee simple estate."

A contingent remainder was, consequently, liable to be destroyed by the sudden or unexpected termination of the particular estate.

Williams on Real Prop. 233.

To avoid this result, the practice was adopted to give an estate, after the determination of the tenant's life interest, to certain persons and their heirs, during their lives, as trustees for preserving the contingent remainders. This mode was favored by the court of chancery by the interposition of that court, when necessary, to prevent such trustees from parting with the estate, or in any way jeopardizing the contingent remainder.

Williams on Real Prop. 236 ; 2 Bl. Com. 171.

The statutes of England have now provided against the destruction of contingent remainders, by declaring that a contingent remainder shall be capable of taking effect, notwithstanding the determination by forfeiture, surrender or merger of any preceding estate of freehold, in the same manner in all respects as if such determination had not happened.

8 and 9 Vic. ch. 106.

It is provided by statute in New York, that no remainder, valid in its creation, shall be defeated by the determination of the precedent estate, before the happening of the contingency on which the remainder is limited to take effect; but should such contingency afterwards happen, the remainder shall take effect in the same manner and to the same extent, as if the precedent estate had continued to the same period.

1 R. S. 725, § 34.

Many of the other common law rules, touching contingent remainders, are also changed or modified by statute.

1 R. S. 724, 725.

Similar changes seem to have been made in most, if not all the other States. The feudal reason for the rules referred to does not apply in this country to estates of inheritance. Such estates in land are all held immediately of the State. There are no rents or services, or other feudal duties for the tenant to perform. There is no one to suffer from a temporary vacancy in the tenancy; nor is the estate liable to be determined therefor, as it was under the feudal laws.

See 2 Bl. Com. 169, note 9.

SECTION III.

THE LIMITATION UPON WHICH A CONTINGENT REMAINDER DEPENDS MUST NOT BE TOO REMOTE. THE SAME RULES APPLY TO EXECUTORY DEVISES. WHAT IS MEANT BY REMOTENESS. THE RULES THAT GOVERN IN THAT RESPECT, AND THE PERIODS OF LIMITATION ALLOWED. REPORTED CASES AND AUTHORITIES EXAMINED.

In determining which of several persons shall have held an estate of inheritance, so that upon his decease intestate it may have descended to his heirs, cases not unfrequently occur where the result depends upon the question whether a certain contingent remainder, or a certain executory devise, or executory interest, was void for remoteness. By the term "remoteness" is meant a suspension of the power of alienation beyond the period allowed by law.

In New York the statute provides that "the absolute power of alienation, shall not be suspended by any limitation or condition whatever, for a longer period than during the continuance of not more than two lives in being at the creation of the estate," excepting that "a contingent remainder in fee, may be created on a prior remainder in fee, to take effect in the event that the persons to whom the first remainder is limited, shall die under the age of twenty-one years, or upon

any other contingency, by which the estate of such persons may be determined before they attain their full age."

1 R. S. 723, §§ 15, 16.

Some of the States have adopted the common law limit, while some do not permit such interests to exist at all.

The limitation of the English common law, was a life or lives in being, and twenty-one years thereafter. The statutes, wherever statutes exist, prescribing limits to dispositions of property of this character, are merely declaratory of the common law rule, differing only in the period of time prescribed, where they differ at all.

This limitation originated in this way: Contingent remainders, and dispositions of property of like character, were, when first practiced, contrary to law. Williams on Real Property, 218. They were attempts to subvert the right of alienation, which the commercial interests had secured for estates in fee. This contest between feudalism and commerce, was compromised through the courts, by legalising the attempts at perpetuity by the creation of contingent and future interests to a limited extent. The courts proclaimed to the feudal interest, that they might go to the extent of a life or lives in being, and twenty-one years and nine months thereafter, but no further. That period has been substantially maintained ever since, and seems to be the period most common in this country.

It requires but a glance at the operation, and its effect, to manifest the original illegality of a contingent remainder; and of the kindred modes of creating other like future interests. It was an attempt to change the terms of a contract by one of the parties, without consulting the other party. The tenant in fee of the crown, held his estate by a grant or lease from the crown, to himself and his heirs. That contract not only vested in him the right to possess and enjoy the land, but as the law then was, secured to him and his heirs, an unrestricted right of alienation. The latter privilege was expressly given by statute to every tenant in fee. In seeking to establish contingent remainders, executory devises,

and other future interests, the tenant was only seeking to change the contract under which he held the land, so that those who might succeed him could not enjoy the right of alienation which was secured to him. It was an effort to obstruct the free commerce in estates in fee which had been established by law. The opposing interest seems not to have been strong enough to entirely withstand the effort; hence the compromise, whereby through the decisions of the courts, partial success was awarded to the feudal interest. The tenant and proprietor in fee was allowed to tie up his estate, so that his posterity, for a certain period, could neither sell nor incumber it; and this conflict between the two opposing interests, has been steadily maintained just at that point, for several centuries. The New York statute has shortened the period from a life or lives in being, and twenty-one years thereafter, with nine months added in a certain class of cases, to two lives in being. The other States seem to have adopted the common law period, or something more nearly like it than New York.

In New York, what is meant by suspension of alienation has been defined by statute, as follows: "Such power of alienation is suspended when there are no persons in being by whom an absolute fee in possession can be conveyed."

1 R. S. 723, § 14.

The statute has also declared a suspension of alienation in the case of trusts as follows: "Where the trust shall be expressed in the instrument creating an estate, every sale, conveyance, or other act of the trustees, in contravention of the trust, shall be absolutely void."

1 R. S. 730, § 65.

It should be borne in mind that it is the *absolute* power of alienation, which the statute declares shall not be suspended by any limitation or condition for any longer period than the one named. That is the character of the suspension prescribed against by the laws of all the States. It is, therefore, an evasion of the rule to hold a contingent interest

valid, where the contingency may not happen within the period limited, by declaring that the estate is vested, but subject to be divested on the happening of the contingency. A conditional alienation of an estate is a contradiction in terms, and is no alienation at all. An interest which is to depend upon some contingency or condition, is not an interest that can empower its holder to alien the estate in fee. It is impossible for a person to alienate a right to which he is himself an alien; and it is an impossibility, insurmountable by legislatures or courts, in governments constituted like ours. It is precisely that kind of suspension of alienation, provided against both by the rule of the common law and by the rule of the statute. The statute, therefore, in declaring that the "power of alienation is suspended where there are no persons in being by whom an absolute fee in possession can be conveyed," only proclaims a rule of inexorable logic.

In *Boynton v. Hoyt*, 1 Denio, 53, where a trust created by will was provided to continue until the youngest child, if living, should attain the age of twenty years; the devise was held to be void, and the land to descend to the testator's heirs at law. The testator left only two children.

It was said by the court: "The utmost limit for the continuance of the estate must be bounded by life, or the estate will be void in its creation. No absolute or certain term, however short, can be supported."

How long the power of alienation is to be suspended must be determined by the intention of the testator, as expressed in the will. When that intention transcends the period fixed by law, it cannot be carried into effect. In determining whether it does so or not, there are some auxiliary rules which may assist the lawyer in arriving at a conclusion.

1. There is a general rule of construction, common to all cases, which is necessary to be borne in mind. It is stated by Chancellor Kent, in *Anderson v. Jackson*, 16 John. 403, "that whether these executory devises be, or be not, too remote, depends upon the construction which the instrument ought to receive when it was made, and it is immaterial how

the fact actually turns out. The possibility of the creation of such executory limitations, that the event upon which their existence depends *may* exceed the prescribed limits, vitiates them from the very beginning. If the words do not confine the will at its commencement and by clear, distinct demonstration, to a failure of issue within the restricted time, the executory devise is absolutely void. Nothing which happens afterward can vary the result."

That rule seems to have been generally adopted.

See *Moore v. Moore*, 6 Jones' Eq. (N. C.) 132; *Sears v. Russell*, 8 Gray, 86; *Patterson v. Ellis*, 11 Wend. 260.

In *Hawley v. James*, 16 Wend. 121, it is said of this rule: "So strict is the law not to permit a perpetuity, that it is not sufficient if, in the event, at the death of the testator, it turns out that the estate is alienable within the proper time; but it must be made so by the will, and not be the result of chance."

Chancellor Kent has expressed this rule in his Commentaries, as follows: "If the executory limitation, either of lands or chattels, be too remote in its commencement, it is void, and cannot be helped by any subsequent event, or by any modification or restriction in the execution of it."

4 Kent, 283.

It must not be understood, however, that the whole devise is necessarily void. The portion which exceeds the prescribed period is always void. The rest of the provision may or may not be void, depending upon other considerations, which will be considered in succeeding pages.

2. At common law perpetuities could be created only by means of contingent future estates.

Hawley v. James, 16 Wend. 121.

In case of remainders there is no suspension of the power of alienation, except where the remainder is contingent. In the case last cited it is said: "Before the occurrence of the contingency and the actual vesting of the estate in some one,

there was no person in being who could unite with the owner of the present or prior estate in the conveyance of the fee. Where the remainder or future estate is vested, or where lands are given to A. for life, remainder to B., a person then in being, there is no suspense of the power of alienation, for the owners of the two estates uniting may convey the whole, each one being able to convey his own absolute interest."

It is then remarked of the New York statute in regard to trusts, before cited, that it makes "present vested estates inalienable, and, therefore, perpetuities may now be created in cases unknown to the common law."

It should, however, be borne in mind that all estates were inalienable by the feudal law, and that alienation was an innovation thereupon made by statute. Contingent remainders and future interests, as before remarked, were afterward permitted by the courts to encroach upon the statute to the extent of a life or lives in being and twenty-one years. It is very often remarked in the books that the courts were hostile to perpetuities, and fixed their duration to the period last named. That is not the true statement of judicial history. Perpetuities were made impossible by statute. The courts sanctioned them in violation of the statute; they merely limited the violation of the law. Otherwise, all estates might have been made inalienable to an unlimited period, and the provisions of the statute utterly avoided.

The history of alienations, and of the restrictions permitted thereto, were elaborately considered by Senator Young, in his opinion in *Coster v. Lorillard*, 14 Wend. 369.

In *Philadelphia v. Girard*, 45 Penn. St. R. 9, it was held that nothing was condemned in the law as a perpetuity, unless it attempted to restrain the vesting of an estate or interest for a longer period than a life or lives in being, and twenty-one years and nine months thereafter. It was declared that "no vested grant was a perpetuity."

It was an action of ejectment by heirs at law against devisees.

Brown v. Evans, 34 Barb. 594, turned upon the construction of a will, the provisions of which were as follows: "I give unto my son, Jabez Corwin, and to his heirs and assigns forever, all my property, both real and personal, provided he ever has any lawful heirs that shall arrive at the age of twenty-one years." There was a subsequent clause as follows: "And I do further order and direct, that in case my son Jabez never has any lawful heirs that shall arrive at the age of twenty-one years, that in such case all my property, both real and personal, shall be equally divided amongst my brothers' and sisters' children."

The chief question submitted to the court was, whether the absolute disposition of this property was so far suspended, as to be void.

The court declared this to be the settled rule of construction for such cases; "that it is the character of the limitation at the time it is created, and not the event, as it turns out in fact, which is to determine its validity. If the estate created is such, as by its terms to suspend the ownership of the property for more than two lives in being, it will be void; although in the subsequent history of the estate, or the parties in interest, it may happen that this limit is not exceeded."

It was also held, that "in no aspect, however, can Jabez Corwin be said to have taken a life estate with remainders over, for there is no devise or bequest to his children, if he should have any; and the question of title or ownership lies wholly between him or his representatives on the one hand, and on the other, the devisees or legatees to whom the property is given, if it did not vest in him, or become divested, among whom are the present appellants."

The court said that "the ultimate and absolute title is not determined, until it has been ascertained whether any children which Jabez Corwin might have would live to become twenty-one years of age. As he might have had any number of such children, the title to the property would be suspended, not only during his life, but during the lives of each one of such children who should die under the prescribed

age, and until some one of them should attain that age. If Jabez Corwin had three children, the title to this property might not vest either in him or in the residuary legatees until all these children should die."

The ultimate devise was held void.

The foregoing case fully illustrates the doctrine that the remoteness is to be tested by the events that may happen, and is not to await the events themselves. It would have been possible that this devisee might have left children at his death who were twenty-one years old, and then alienation would have been suspended only during his life.

Amory v. Lord, 9 N. Y. 403, is a case where a devise was held void, because it suspended the absolute power of alienation beyond the continuance of two lives in being at the time when the devise was to take effect.

The testator in that case gave the annual income of all his property to his wife, so long as she remained his widow, for her support and the support of their infant children, till they respectively arrived at twenty-one years of age.

At the death or marriage of the widow, the personal property was to be equally divided among the children living, and the issue of such as were dead; the latter to take by representation or *per stirpes*: but each child was to receive only the net income of one share during life of the real property; and after their several deaths the wife or husband of each was to receive the income during life, and then the fee of each share was to vest in the children of each of the children, so far as the children left children. If they left none, then the same was to vest in the right heirs of the testator.

The entire devise was held void, on the ground that it suspended the absolute power of alienation beyond the continuance of two lives, in being at the time when the devise was to take effect. The decision of the court was arrived at in this way: In the first place, there was a trust that was to continue during the life of the wife. The trust as to the personal property ceased with her life. But it was not so as to the real estate. The children of the testator could receive

only the annual income of that, during the life of each respectively. This was the second life, the widow being the first.

The trust, however, did not stop there, for there was a further provision that, in case the children, or either of them, died, leaving a wife or husband, such wife or husband should receive the income so long as they did not again marry. At the death of such children and the determination of the interests of the husbands and wives, then the fee was to vest in the children of the testator's children. The wives and husbands thus provided for constituted the third life.

It was said:

"If the estate is so limited that by any possibility the power of alienation may be suspended beyond the statute rule, the limitation is void."

Page 415.

It was a case where no one had the power to sell. The trustees could not sell, and *the cestuis que trust* were prevented from selling.

1 R. S. 723, §§ 60, 63

Jennings v. Jennings, 7 N. Y. 547, is a case where a will was declared void for suspending the power of alienation beyond the termination of two lives in being. The objectionable feature of the will, in this case, was in the provision that after supporting the widow and children, the surplus of the income should be invested in trust for the children, and divided into equal portions and distributed to said children as they severally became twenty-one years of age.

It is said in the opinion: "The scheme of the will is therefore this—that the income of the testator's estate, real and personal, after the payment of his just debts, should be applied to the clothing and maintenance of his wife, and the clothing, maintenance and education of his children by her, and the surplus was to be invested by the wife as trustee for the children. The property was all to be kept together, undivided, until the eldest surviving child by his present wife

should become twenty-one years old, and then to be appraised, and his or her equal share apportioned and paid if required."

The number of children exceeded two, and "the creation of a trust term by will to continue until the youngest of a testator's children and grandchildren, attaining the age of twenty-one years, shall have attained that age, where the number exceeds two, is void under the Revised Statutes of this State, as suspending the power of alienation of an absolute fee in possession for more than two lives in being, and without reference to any designated life or heirs."

Hawley v. James, 16 Wend. 61; see also *Boynton v. Hoyt*, 1 Denio, 23.

In *Everitt v. Everitt*, 29 N. Y. 71, it was held that "the suspension, which it is the purpose of the statute to limit, may be effected by one of two methods: either by providing for the creation of future estates, to take effect upon the happening of some prospective event, the occurrence of which is essential to the vesting of such future estate, or by conveying the estate to trustees upon some authorized trust. A lawful suspension of the absolute ownership may be effected in either or both these methods; but the period of suspension must be measured by existing lives, or by some more proximate event which may happen during life; and the persons whose lives are to furnish the measure of the suspension must be designated or referred to, so as to be capable of ascertainment in the instrument by which the disposition is made."

It is remarked at page 75, that "if futurity is annexed to the substance of the gift, the vesting is suspended."

In the case of the *Brattle Square Church v. Grant*, 3 Gray, 142, there was a devise of certain land to three persons named, as deacons of the church, and to their successors in office, to hold the same, upon the express limitation that the minister of the church should constantly reside in the house on the premises during the time he should remain such minister; and in case the premises should not be so occupied, there was a devise over to the testator's nephew, John Hancock, and to his heirs forever.

The case arose upon a bill in equity by the proprietors of the church for leave to sell the premises.

The first question urged was, whether the limitation was void as being too remote, and as, therefore, tending to create a perpetuity. It was held to be too remote, and, therefore, the devise over was void.

The reason assigned by the court for so deciding, illustrates the character of the limitation which is allowed in such cases. It is said: "Executory devises, in their nature, tend to perpetuities, because they render the estate inalienable during the period allowed for the contingency to happen, though all mankind should join in the conveyance. They cannot be aliened or barred by any mode of conveyance, whether by fine, recovery, or otherwise. Hence the necessity of fixing some period beyond which such limitations should not be allowed. It has, therefore, long been the settled rule in England, and adopted as part of the common law of this commonwealth, that all limitations, by way of executory devise, which may not take effect within the term of a life or lives in being at the death of the testator, and twenty-one years afterward, as a term in gross, or, in case of a child *en ventre sa mere*, twenty-one years and nine months, are void as too remote, and tending to create perpetuities."

The court then discuss another rule, which is to be applied in order to test the legality of the limitation. It is said of the limitation: "It is not sufficient that it be capable of taking effect within the prescribed period; it must be so framed as *ex necessitate* to take effect, if at all, within that time. If, therefore, a limitation is made to depend upon an event which may happen immediately after the death of the testator, but which may not occur until after the lapse of the prescribed period, the limitation is void. The object of the rule is, to prevent any limitation which may restrain the alienation of property beyond the precise period within which it must by law take effect."

Of the particular matter which constituted the limitation, it is said: "The minister of the church in Brattle square, it

is true, might have ceased constantly to reside and dwell in the house, and it might have been improved for other purposes, within a year after the decease of the testatrix; but it is also true that it may be occupied as a parsonage, in the manner prescribed in the will, as it has hitherto been during the past seventy-five years, for five hundred, or a thousand years to come."

Pages 152, 153.

In another place, the court laid down this general rule, whereby to test the validity of the limitation in such cases. It is said: "The true test by which to ascertain whether a limitation over is void for remoteness, is very simple. It does not depend on the character or nature of the contingency or event upon which it is to take effect. These may be varied to any extent. But it turns on the single question whether the prescribed contingency or event may not arise until after the time allowed by law, within which the gift over must take effect. Applying this test to the present case, it needs no argument or illustration to show that the devise over to John Hancock and his heirs, is upon a contingency which might not occur within any prescribed period, and is therefore void, as being too remote."

The second question was, as to the effect of the invalidity of the devise over, on account of its remoteness, upon the preceding gift to the deacons. Upon this point the court declared this to be the general rule:

"The general principle applicable to such cases is, that when a subsequent condition or limitation is void by reason of its being impossible, repugnant or contrary to law, the estate becomes vested in the first taker, discharged of the condition or limitation over, according to the terms in which it was granted or devised."

The court then proceeded to show upon principle and by authority that such were the general rules applicable to all contingent interests.

The prayer of the bill was granted, and there was a decree for the sale of the premises.

It seems to have been urged, on the part of the defense, that to grant the prayer of the plaintiffs would defeat the expressed intention of the testator; to which the court answered that "no principle is better settled than that the intent of a testator, however clear, must fail of effect if it cannot be carried into effect without a violation of the rules of law."

And they further remarked that "the claim set up by the heirs at law of the testatrix to the premises in controversy, is in direct contravention of the clear intent of the will, by which they are studiously excluded from any share or interest whatever in this estate. All that she did not specifically devise, is given by the residuary clause to John Hancock. Her heirs, therefore, can claim only by virtue of an arbitrary rule of law, and it certainly more accords with the general intent of the testatrix that the absolute title in this estate should, by reason of the invalidity of the gift over, be vested in the deacons and their successors, who were manifestly the chief objects of her bounty in this devise, than in her heirs at law, whom she so carefully disinherited."

It may be remarked, in conclusion, upon this point, that the intention of the testator or assignor must control, if it does not conflict with established rules of law. But if it may result in suspending the absolute right of alienation beyond the period fixed by the law of the State where the land lies, the intention is not to be regarded.

SECTION IV.

THE DEVISE OVER MUST NOT BE REPUGNANT TO THE PRECEDING DEVISE. WHAT IS MEANT BY REPUGNANCY. EXAMPLES OF THAT CHARACTER, AND THE DECISIONS THEREUPON EXAMINED AND CONSIDERED.

We have before noticed a class of cases where the devise over has been held void for remoteness; that is, because there was an attempt to postpone the vesting of the estate of inheritance to a period not permitted by law. We are

now to notice a class of cases where the devise over has been held void, because of repugnancy; that is, where it is inconsistent with the previous devise. It may be said, generally, that where the testator plainly expresses the intention to vest the estate of inheritance in the first devisee, any further attempt to devise it over, is inconsistent, and void for repugnancy. There seems to be no room for dispute as to the general rule; for no one can have anything more than an estate in fee in any certain parcel of land; and when he has once given that away, he has nothing more to give. Any further attempts to bestow upon others, must be futile and void.

This point, like some others, can be best understood by examining some of the leading cases.

In *Ide v. Ide*, 5 Mass. 500, there was a devise to the testator's son, with this clause following: "And, further, it is my will that if my son Peleg shall die, and leave no lawful heirs, *what estate he shall leave*, to be equally divided between my son J. and my grandson N. to them and their heirs forever." This devise over was held to be void, because it was inconsistent with the absolute interest of the first devisee.

The decision in this case was made to turn upon the expression of the will, "*what estate he shall leave*." It is said, "The limitation over is not of the estate devised to Peleg, but of what estate devised to him, he shall leave. From this expression it seems very clear that the testator, after having devised an express fee simple to Peleg, intended also that he should have an unqualified power to dispose of it at his pleasure; and if he should dispose of the whole, there would be nothing left subject to the executory limitation."

A like ruling was had in *Jackson v. Bull*, 10 John. 19. The devise was to the testator's son Moses, and his heirs and assigns forever. This was followed by a provision as follows: "In case my son Moses should die without lawful issue, *the property he died possessed of*, I will to my son Young," etc. The devise over was held void, as being repug-

nant to the absolute ownership given to Moses. The court held that the testator intended to give to his son Moses, absolute control over the estate devised. They say, the words, "the property he died possessed of," imply an intention on the part of the testator to give the devisee the power of alienation.

See also *Jackson v. Delancey*, 13 John. 586; *Jackson v. Robins*, 15 id. 169.

In *Smith v. Bell*, Mart. & Yerg. Rep. 305, the general rule was thus stated, as applied to the facts of that case :

"The devisee, the first taker, has a use only of the property devised during life, if the executory devise is good. But if the first taker is given an absolute estate in the property devised, then the limitation over is void, being inconsistent with the interest given to the first taker, which was the entire estate; and, consequently, nothing remains for the second taker."

It was further said: "If the first taker could exercise absolute control over the property, by selling the same, and vesting in the purchaser an indefeasible title, it would then be useless for the law to recognize and guard with anxiety an executory devise that it could not preserve for the remainderman. In all such cases the rule is, that the devise over is void, and that the first taker has an estate in fee."

In *Holmes v. Godson*, 35 Eng. Law & Eq. 591, there was a devise to the testator's son, Thomas Yates Ridley, of all the testator's real and personal property, to vest upon his attaining twenty-one; with a further provision, that in case his son should not live to attain the age of twenty-one years, or "having attained the age of twenty-one years, shall not have made a will," the property should go over. The son attained twenty-one, but died intestate. It was held that the son took an absolute estate in fee; and that the gift over was void for repugnancy.

Having arrived at the conclusion that the fee vested in the son, on his attaining twenty-one, it is said per Turner, L. J. :

"The sole question, therefore, on the plaintiffs' title is, whether the fee, which was thus vested in the son, was defeated, and the estate carried over to the widow and Mr. Godson by the event which happened, of the son having afterward died without having made a will. I am of opinion it was not.

"The law, which is founded on principles of public policy for the benefit of all who are subject to its provisions, has said that, in the event of an owner in fee dying intestate, the estate shall go to his heir; and this disposition tends directly to contravene the law, and to defeat the policy on which it is founded. On principle, therefore, I think the disposition bad, and the cases which were cited in the argument appear to me to be conclusive on the point."

In that case, the testator indicated his intention to bestow on the first devisee the absolute property, particularly by the words "shall not have made a will." He evidently meant that he should have the right to dispose of the estate by will. This was regarded as a sufficient expression of the intention to give him the absolute property.

Smith v. Hunter, 23 Ind. 580, is of the same class of cases. The action was ejectment. There was a devise of land to an adopted son, with a further expression of the intention that the estate should go to a daughter of the testator, in case the adopted son should die childless. The expenses of the adopted son's education were to be defrayed, as far as necessary, out of the land; and, if necessary, the land was to be sold by the guardian to pay the expenses of his maintenance and education. The land thus devised was sold by the guardian to pay such expenses, but the daughter was not made a party to the proceedings. The plaintiff was allowed to recover on the ground that the daughter was not made a party to such proceedings. The plaintiff claimed as the heir at law of the daughter, and the defendant under the purchase at the guardian's sale. But it was said that the adopted son "held a fee simple conditional, and dying childless there was a failure of condition, and the estate went to the heirs of the daughter by executory devise."

But it was further held, that the expenses of the maintenance and education of the adopted son were a charge upon the estate, and it might have been sold and a good title given by the guardian.

The correctness of the decision cannot be denied, but the dictum that the devisee "held a fee simple conditional," and that on dying childless the estate passed to the daughter, cannot be sustained consistently with the established doctrine of other cases. The power to sell the premises to defray the expenses of maintaining and educating the son, were a manifest expression of the intention of the testator that the title of the son should, in any event, embrace the absolute disposition of the premises, and, therefore, any devise over must have been void for repugnancy. The opinion is not consistent with itself. If the devisee took an estate which could be sold for his support he did not take it conditionally. The expression, that he "held a fee simple conditional," is an anomaly. It would be more consistent to say that he held it conditionally, for, as we have before seen, the condition, if there was any, attached to his right to the estate, and not to the estate itself.

The case of *Brown v. Brown*, 43 N. H. 17, partakes, in a measure, of the same character. The testator devised property to his son R. for life, and after his decease to R.'s sons. He also charged R.'s interest with the payment of certain debts. R. died before the testator. The question was, whether R.'s death before the testator, defeated the devise to his sons; and whether the interest of the sons was charged with the debts. It was held that the devise in remainder was not defeated by the death of the devisee for life, and that the remainder was not charged with the debts. But so far, the case seemed to call for no expression of opinion. The action was ejectment by the plaintiff, as heir at law of the testator, against the defendant who claimed under the devise over. The plaintiff was allowed to recover on the ground that the land in question was not included in the devise. The other questions discussed were not in the case.

In *Doe v. Thomas*, 3 Ad. & El. 123, there was a devise to the testator's wife, "her heirs and assigns forever, of a certain house and personal property," with this qualification added: "with the intention that she may enjoy the same during her life, and by her will dispose of the same as she thinks proper." It was held that the wife took the estate in fee absolute. The power to dispose of the estate by will was treated as evidence of an intention on the part of the testator to give her the fee absolutely.

What interest the first devisee has, where there is a devise over upon a contingency, has been differently expressed in different cases. Some cases hold the doctrine that the first taker takes the estate in fee, subject to be divested thereof by the happening of the contingency. But that seems to be an incorrect view of the interest of the first taker. Regarded in that light, any devise over would be void for repugnancy. If the first taker has a vested fee, there is nothing more to go to any one. It has been the common mode of answer to that point, that the first taker took a fee conditional, and was divested thereof by the happening of the contingency. This theory is utterly inconsistent with the law.

1. The testator cannot change the character and tenure of the estate by his will. He has an estate in fee simple; that is, there is a grant or lease of which the State is the party of the first part, and he is the party of the second part, whereby he has, at his death, an estate in fee. He has a right to name his successor to that contract or estate by his will. But he cannot change the estate. He held a fee simple. He cannot so change its character that his devisee shall hold a fee conditional. The conditions prescribed in his will do not, as we have before shown, affect the tenure of the estate. They can affect only the interest of the devisee in the estate.

It is idle to say that the fee vests, but is subject to be divested by the happening of the contingency, or the non-fulfillment of some condition prescribed in the will. At common law, no estate could be divested by the operation of

a condition, except by the conditions to be found in the grant or lease which created the estate. The tenant, on assigning his estate by will or otherwise, could not annex conditions to it, which should operate to defeat the estate in the hands of his assignee or devisee. And, under the allodial system of tenures, as that system exists in this country, especially as it is regulated in New York, it is still more absurd to say that the tenant can attach conditions to the estate by his will or otherwise. All estates in fee are created by a grant or contract of the State, and even the State is restricted from imposing any conditions whatever to the tenure whereby the tenant shall hold, except that the estate shall be liable to escheat. The State can impose no conditions subsequent which can possibly operate to divest the estate.

See Bingham on Real Estate, 830 *et seq.*

The correct view of the theory in such cases has been taken in the New York court of appeals in the following cases :

The point of repugnancy, or conflict, between different provisions of a will, was made and passed upon in *Tyson v. Blake*, 22 N. Y. 558. The provisions of the will, which were in question, were as follows :

Item: I give and bequeath unto my grandchildren, namely, Aaron Tyson and Edwin Tyson, sons of David Tyson, deceased, and Richard Tyson, son of Abraham E. Tyson, deceased, and Mary Emeline Tyson, daughter of my son John Tyson, deceased, the whole of the net proceeds of my estate that shall remain after my funeral and testamentary charges, and all my just debts, etc.; said net proceeds to be divided equally, share and share alike. But in case my granddaughter, Mary Emeline, should die without lawful issue, then her share to be equally divided among my three grandsons aforesaid, share and share alike, to them, my said grandchildren, their heirs and assigns."

Edward Blake was appointed guardian of the daughter Mary Emeline, and upon receiving money of the executors, entered into a bond with surety to pay it back, in case the

said Mary Emeline should die without lawful issue. She died without lawful issue, and this action was brought upon the bond to recover the money so paid. Judgment was entered for the plaintiff upon a referee's report, for the amount of the several payments and interest, and the defendants appealed.

The principal point made on the appeal was, that the gift to Mary Emeline was absolute; and the limitation over was repugnant thereto, and therefore void.

The court held otherwise, and explained the decision as follows: "The provision, called the limitation over, is nothing more than a qualification of the previous gift to Mary Emeline, and shows the intention of the testator to have been that she should take, in the contingency named, a life estate only in the legacy thus given to her. It amounted to an executory bequest to the three grandsons. If she died without issue, then they became entitled to her share absolutely. If she should die leaving issue, then such issue would take her share absolutely. There is in fact, therefore, no repugnancy in the limitation over, the language employed being merely expressive of the intention of the testator to make a disposition of the share of the granddaughter, in the event of her dying without issue, different from what the law would make it if she should die leaving issue." And they relied upon the opinion expressed in *Norris v. Beyea*, 3 Kern. 273, which was quoted as follows: "There is, in truth, no repugnancy in a general bequest or devise to one person, in language which would ordinarily convey the whole estate, and a subsequent provision that, upon a contingent event, the estate thus given should be diverted and go over to another person. The latter clause, in such cases, limits and controls the former, and when they are read together, it is apparent that the general terms, which ordinarily convey the whole property, are to be understood in a qualified, and not in an absolute sense."

In *Norris v. Beyea*, from which that quotation is made, the cases upon this point are generally reviewed and criti-

cised. The general rule of construction which was allowed to control, was, "that all the parts of an instrument are to be taken together, in ascertaining its meaning, and that no part of it should be rejected as inoperative, if the whole can reasonably stand together."

That is a consistent view of the question. It leaves the contingency or condition to affect only the right of the parties to the estate, and not the estate itself. It avoids the absurd theory, that the first devisee takes a fee conditional, to be divested by the happening of a contingent event, or the non-fulfilment of a condition. It does not undertake to create estates with conditions, after the manner of the feudal theory, by the means of testamentary alienations, or assignments between living parties. It reads the whole will together, and gives to it a rational construction. The first taker has the use of the property for life, and if he leaves issue, they take the fee. If he does not, it vests in the second devisee.

About the same view was taken in *Marston v. Marston*, 47 Maine, 495.

There was a devise of land to O., "after his mother shall cease to be my widow," providing he shall live on the place, and carry it on till that time in a workmanlike manner." The devisee left the place, and voluntarily neglected to carry it on as required by the provisions of the will. It was held that he took no estate under the will, but only his share as one of the heirs at law, on the death of the mother.

The provision of the will in regard to carrying on the place was thus treated as a condition precedent. No estate was held to vest in the devisee because of its non-fulfillment. The fee was in the mean time in abeyance, awaiting the performance of the condition, or the failure to perform. The devisee failing to fulfill, the fee vested in the heirs at law. Under the allodial system of estates in fee, the State being the reversioner and landlord, and no rents to be paid or services rendered therefor by the tenant, there is no obstacle to allowing the fee to be in abeyance, except that it suspends the

right of alienation. Consequently, the laws against perpetuities limit the time when the fee may be held in abeyance. Whether it can be so held in abeyance, by a condition precedent, of the character there imposed, is a question which seems not to have been made in that case. We shall examine that question before we leave the subject.

In *Hubbard v. Rawson*, 4 Gray, 242, there was a devise to a certain person named, and his heirs, in trust for the sole, separate and exclusive use of the testator's daughter, Lucy Morris, wife of Godfrey Morris, her heirs and assigns forever. In case the wife should survive her husband, the trustee was to convey to her absolutely at her request. She was also authorized to dispose of the property by will or other conveyance.

It was further provided, that if the daughter did not dispose of the property, the trustee should convey and deliver over to her children what remained, to be equally divided between them.

The daughter died in 1850, leaving her husband and two infant children surviving. One of the children, a daughter, married, and on her petition a partition of the land was made between her and her brother Augustus. Soon after, Augustus died under age and unmarried. In 1854 the trustee conveyed the land to the daughter, and she and her husband conveyed to the plaintiff, who entered upon the premises and brought this action of trespass. The defendant justified under Godfrey Morris, the father of the two children. Godfrey Morris claimed to derive title by descent from his son Augustus.

The case turned upon this point: whether Augustus took his title under the will of his grandfather, or by descent from his mother. If the former, it descended to his father upon his death; if the latter, it descended to his sister.

The court held that he took by purchase under the will of his grandfather.

The decision of the court was thus expressed in the opinion: "The testator having, by the terms of his devise, made the

children of Mrs. Morris his devisees, to take the estate upon a certain contingency, and that contingency having occurred, they must be held to have taken the estate as purchasers under the will."

And it is said that "this devise over is inconsistent with the idea that the testator intended to devise an absolute estate to Mrs. Morris, so that, in the event of her death, it would descend to her children or heirs at law as her intestate estate."

The interest which Mrs. Morris took is described by the court as "only an equitable fee simple contingent, liable to be defeated upon her dying before her husband," in case she made no disposition thereof by will or otherwise.

This case is in apparent conflict with the other cases before cited, which held the devise over void for repugnancy. The inconsistency of the two is conceded. The first devisee was authorized to dispose of the estate by will or otherwise. This has been held a sufficient expression of intention by the testator to vest the absolute property in the first devisee, and defeat the second devisee in any event. In the case under review, the inconsistency is admitted, but the devise over is held to control the other. Under that rule of construction, the devise over can never be held void for repugnancy.

This case is also a departure from the doctrine of the following cases, and the authorities upon this point generally.

In *Lovett v. Kingsland*, 44 Barb. 560, the devise was: "I give to my granddaughter, H. G., one-fourth part of all my real and personal estate; and the other three-fourths to be equally divided between the rest of my grandchildren after the death of my two daughters, A. and M., and no division in any case before that time."

It was held that this devise operated to give the devisees a present vested interest, and not a future executory interest; that it did not give to them future estates as remainders, because there was no precedent estate to sustain them in that character; and that the provisions restricting the division, or the incumbrance of the premises, were attempted restric-

tions of the absoluteness of the gift, and inconsistent with, or repugnant to, the gift itself; and could not be regarded as any thing more than mere recommendations to the donees.

The disposition of that case was consistent with the established rule of other cases. In the case of the *City of Philadelphia v. Girard*, 45 Penn. St. R. 9, the court held this general doctrine, that "where a vested estate is distinctly given, and there are annexed to it conditions, limitations, powers, trusts or other restraints, relative to its use, management or disposal, that are not allowed by law, it is these restraints and the estates limited on them that are void, and not the vested estate."

The rule as there stated, however, must be taken as subject to some qualifications. The provisions which are not allowed by law are undoubtedly void in all cases; but it is not true that the provisions connected with them, which are of themselves unobjectionable, are always to be held valid and operative. It appears to have been a subject of much discussion how far the provisions which are void shall affect the other provisions of a will. Some cases have held that only the objectionable provisions are void, while others have treated the whole as thereby made void.

In *Sears v. Russell*, 8 Gray, 97, it was held that "if a provision is void as being too remote, the will is to be construed as though no such provision was in it, and the person otherwise entitled will take it discharged of the devise."

In *Fosdic v. Fosdic*, 6 Allen, 41, the whole will was held void, because some of its provisions were void as being too remote, and in violation of the rule against perpetuities.

In *Brown v. Williamson*, 36 Penn. St. R. 338, the illegal parts of the will only were held void, while effect was given to the other parts.

The same rule, as in the last case, was held in *Smith v. Dunwoody*, 19 Geo. 237.

Although different general conclusions are reached in these cases, they are not, as it will be shown, in conflict as to the principles which controlled them.

In *Amory v. Lord*, 9 N. Y. 403, before cited, the whole devise was declared void, on the ground that the absolute power of alienation would be suspended beyond the continuance of two lives in being, at the time when the devise was to take effect.

In *Savage v. Burnham*, 17 N. Y. 501, the provisions that were unlawful were pronounced void ; while all that were not unlawful were declared valid. There was held to be a devise in trust during the life of the wife that was good. That constituted one life within the provisions of the statute. There were then provisions in favor of several children of the testator, which were to vest and become payable, severally, to the sons on arriving at the age of twenty-one, and the children of the daughters on the death of each daughter. These provisions were held to embrace another life. There were devises over, depending on the contingency of the death of the sons under twenty-one, and of the daughters without issue, which were held void as being in conflict with the statute provision, that the absolute ownership should not be suspended "for not more than two lives in being at the death of the testator."

1 R. S. 773, §1.

The leading question was, in the language of the court, "Can those ulterior limitations ever be dropped and the primary disposition of the estate be allowed to stand?" It was not contended that they could be, as a general legal proposition. The point on the one side was, that all the provisions and limitations, the bad as well as the good, were enveloped in a single trust, and must, therefore, all fall together. But the court held the good parts should be saved, if, in so doing, the intention of the testator would be thereby effectuated rather than defeated ; and they went through with an elaborate examination of the provisions of the will, for the purpose of determining whether, if the void provisions were left out and the good parts only carried into effect, the practical results would fulfill the intention of the testator, so far as

they went. After tracing the valid provisions to their practical ends, it is said: "These are the objects which the testator had principally in view. If these objects, or any of them fail, then there are further limitations over, which, as we have seen, are invalid; but the invalidity of those should not, in reason or justice, be allowed to subvert the testator's primary and fundamental design."

In regard to general rules in this respect, it is said: "It needs no argument to show that a trust created for a single purpose, unauthorized by law, is void; but it does not follow that an entire trust is void where it is made to subserve also another purpose which is lawful. It has sometimes been thought that the maxim, 'void in part, void in toto,' expresses a general principle of law; but it really does not, as every one must see, on a moment's reflection. In the nature of things, in reason, and, above all, in justice, it may and must be true that a deed, a will, or other instrument, can in part be good, although another part is void because in contravention of positive law."

The true principle is unquestionably there stated. It cannot be taken to be an arbitrary rule that the provisions of a will which contravene the law, are the only parts of the will which are to be held void. Nor is it an arbitrary rule that, being void in part, the will is void in the whole. The illegal parts are to be omitted in all cases. Then the question is, whether what remains, if carried into effect, will fulfill the intention of the testator. If it will, it must be held valid and carried into effect. If it will subvert his intentions, the whole will is void. Consequently, each case must stand upon its own merits in that respect, and be disposed of accordingly. There is no standard by which the question can be tested, except the general principle here expressed.

The doctrine of that case is fully sustained by the following authorities:

Darling v. Rogers, 23 Wend. 488; *Doe v. Pitcher*, 6 Taunt. 359;
Hawley v. James, 5 Paige, 818.

In the case of *Darling v. Rogers*, here cited, the rule is thus expressed: "This is, in substance, that when a will is good in part and bad in part, the part otherwise valid is void, if it works such a distribution of the estate, as from the whole testament taken together, was evidently never the design of the testator. Otherwise, when the good part is so far independent that it would have stood, had the testator been aware of the invalidity of the rest."

In *Coster v. Lorrillard*, 14 Wend. 265, the court adopted the same doctrine; and declared the whole will void on the ground that, to give effect to the valid portions only, would evidently defeat the intention of the testator.

Gilman v. Reddington, 24 N. Y. 9, held to the like doctrine; and, as in *Darling v. Rogers*, declared the legal provisions of the will good, only pronouncing the illegal provisions inoperative.

This doctrine was approved and commended in *Kane v. Gott*, 24 Wend. 665, 666, as follows: "The most important consequence, sought to be drawn from the will being void, in respect to these remote collateral provisions, is, that therefore the whole is necessarily void. Nothing is better settled than the direct contrary."

Dodge v. Pond, 23 N. Y. 69, belongs to that class of cases; and held the provisions of a will partly valid and partly invalid.

Beekman v. Bonsor, 23 N. Y. 298, is a case where the whole will was pronounced invalid, on the ground that one of its provisions could not be executed; and, as the amount devoted to the invalid purpose could not be ascertained by reason of its failure, there was no means whereby to ascertain the amount of the remainder; and, consequently, that was void for uncertainty in the amount.

In the syllabus to the case, it is said: "A bequest of a sum of money to be invested in land, of which the rents and profits are to be applied to certain beneficiaries during fifteen years, the land then to be sold and the proceeds divided amongst the same persons, is void, because it contemplates a trust which would unlawfully suspend the power of alienation."

It is said in the opinion — page 317 — of that particular trust: "This would have been a lawful trust, or power in trust, if the postponement of its execution for an absolute period of time did not suspend the power of alienation in a manner which the statute does not permit."

In *Forsyth v. Rathbone*, 34 Barb. 388, there was a direction for the accumulation of the surplus income for the benefit of four grandchildren of the testator until the youngest attained majority. This was held void so far as it provided for the accumulation after their majority. "But," it was said, "this direction for an unlawful accumulation does not affect the validity of the bequest of the fund, or of its surplus income, to the grandchildren. As the grandchildren severally attain their majority they will be entitled to their share of the surplus income, notwithstanding the direction for accumulation." It had been held in the same decision that the grandchildren took a vested interest in the property, from which this income was derived, at the death of the testator, although the will was in the form of a future devise or bequest, and only the payment or enjoyment was postponed until each attained majority.

See also *Phelps v. Phelps*, 28 Barb. 121; *Davidson College v. Chambers*, 3 Jones' Eq. R. 253; *Kilpatrick v. Johnson*, 15 N. Y. 322; *Gooding v. Read*, 31 Eng. Law & Eq. 109; *Somervill v. Lethbridge*, 6 Term R. 213.

Smith v. Bell, 6 Peters, 68, is a case where the intention of the testator, as deduced from the whole will, was allowed to control the phraseology of a particular clause.

In one clause of the will in question, the testator gave all his personal property to his wife, "to and for her own use and benefit, and disposal absolutely; the remainder of said estate, after her decease, to be for the use of the said Jesse Goodwin." The wife again married. Jesse Goodwin sold and assigned his interest to the plaintiff, who, after the death of the wife of the testator, brought this action for the property. The second husband, the defendant, claimed that his deceased wife took the property under the will of her first

husband, absolutely, and that, consequently, upon her decease, it came to him as part of his marital right. The plaintiff claimed, as the assignee of Jesse Goodwin, that the wife took only a life estate, subject to a remainder over on her decease. It was the obvious and natural conflict of the two provisions of the will. It was held that Jesse Goodwin took a vested remainder to come into possession after the death of the widow.

The decision was put upon the ground that such was the unquestionable intent of the testator.

Chief Justice Marshall, in delivering the opinion of the court, among other things, urged in justification of the decision, said :

“In the construction of ambiguous expressions, the situation of the parties may very properly be taken into view. The ties which connect the testator with his legatees, the affection subsisting between them, the motives which may reasonably be supposed to operate with him, and to influence him in the disposition of his property, are all entitled to consideration in expounding doubtful words, and ascertaining the meaning in which the testator used them.

“In the will under consideration but two persons are mentioned—a wife and a son. The testator attempts, in express words, to make provision for both out of the same property. The provision for the wife is immediate; that for the son is to take effect after her death. The words of the will make both provisions, but it is doubtful whether both can have effect.

“It must be admitted that words could not have been employed, which would be better fitted to give the whole personal estate absolutely to the wife, or which would more clearly express that intention. But the testator proceeds: ‘the remainder of said estate, after her decease, to be for the use of the said Jesse Goodwin.’ Jesse Goodwin was his son.

“These words give the remainder of the estate, after his wife’s decease, to the son, with as much clearness as the preceding words give the whole estate to his wife. They manifest the intention of the testator to make a future provision

for his son, as clearly as the first part of the bequest manifests his intention to make an immediate provision for his wife. If the first bequest is to take effect according to the obvious import of the words taken alone, the last is expunged from the will. The operation of the whole clause will be precisely the same as if the last member of the sentence was stricken out; yet both clauses are equally the words of the testator, are equally binding, and equally claim the attention of those who may construe the will. We are no more at liberty to disregard the last member of the sentence than the first. No rule is better settled, than that the whole will is to be taken together, and is to be so construed as to give effect, if it be possible, to the whole. Either the last member of the sentence must be totally rejected, or it must influence the construction of the first so as to restrain the natural meaning of its words; either the bequest to the son must be stricken out, or it must limit the bequest to the wife, and confine it to her life. The limitation in remainder shows that, in the opinion of the testator, the previous words had given only an estate for life. This was the sense in which he used them."

We have quoted more fully from the argument of the court, because it is a very clear and logical exposition of the question, as the language of the will presents it, independently of attending circumstances; and because that mode of construction would seem, at first view, to preclude the doctrine of repugnancy in any case. Applying that mode of reasoning, it would seem impossible to pronounce a remainder over, in any case, void for being repugnant to the particular interest.

But a critical examination will show that the decision in that case does not strictly conflict with the decisions which have held attempted dispositions in remainder void for repugnancy. Those cases, as before shown, have pronounced the interest of the first taker absolute, not so much because it was so pronounced in the language of the will, as because the will gave to the first taker the power of selling and trans-

ferring the property, either in express terms or by necessary implication. That power of disposition, conferred upon the first taker, has been held to give to the interest of the first taker a character so unmistakably absolute, that it could not be changed by the provision assuming to give a remainder over; and, therefore, the provision as to the remainder over, has been held void for repugnancy to the first interest.

In this case of *Smith v. Bell*, the court hold that the words of the will which give the property to the wife "to and for her own use and benefit, and disposal absolutely," are capable of being limited in their meaning by adding thereto the words "during her life." It is said: "The words there are susceptible of such limitation. It may be imposed on them by other words. Even the words 'disposal absolutely' may have their absolute character qualified by restraining words connected with, and explaining them to mean, such absolute disposal as a tenant for life may make."

And it is remarked, that the words which give the remainder over may be properly construed as equivalent in their effect upon the interest of the first taker, to the expression "for life" added thereto. It is said: "They manifest with equal clearness the intent to limit the estate given to her, to her life, and ought to have the same effect."

The situation of the parties, the character and limited amount of the property, and the inconvenience or difficulty of dividing it, were considered as attending circumstances which authorized and demanded the construction adopted by the court.

Smith v. Bell is not alone among the reported cases where the gift over has been held valid, notwithstanding the gift to the first taker has been made in the language of absolute donation, on the ground that the gift over must be construed to qualify the first gift. The point made in that case might have been made with equal propriety in several of the cases before cited. The case of *Anderson v. Jackson*, 16 John. 399, was equally absolute in its language of donation to the first taker; but the point of repugnancy was not made.

There is a kind of property, composed of things *quae ipso usu consumuntur*, which cannot be transferred in remainder. There can be no limitation after a life interest in such articles. They are cases which do not depend on the construction of wills, but on the character of the property itself. They are limited to articles where "the use and the property can have no separate existence."

Porter v. Tournay, 3 Ves. 311, and *Randall v. Russell*, 3 Meriv. 190, are cases of that character.

But it must be borne in mind that property of that kind is the subject of no such absolute rule. The intention of the donor must control. If it be given to the first taker, with the evident intention that it was for his personal consumption, any gift over would be repugnant and void. The fact, however, that the property given was perishable, would not of itself authorize the finding of the intention to make the first gift absolute. It might be sold, and the proceeds become the subject of the gift over.

Bule v. Kingston, 1 Meriv. 314, was an action by the claimant of property under a will assuming to give a life interest to one person and the remainder to another. The testatrix gave £1,500 to J. E. T., his executors, etc., in trust for her sister C. W. for her separate use, and all other sums due to her. The will then contained this provision: "What I have not otherwise disposed of, I give to my said sister the unlimited right of disposing of by will, excepting to E. P.; and in case my said sister dies without a will, I give all that may remain of my fortune at her decease to my godson, William Ashby." This bequest to William Ashby was held void for repugnancy to the gift to Charlotte Williams.

There seems to be no doubt, that where there is an absolute gift, a legacy or devise over is void as being inconsistent with the absolute estate previously given.

Pinckney v. Pinckney, 1 Bradf. 271.

The point open to dispute is, whether the first gift was intended to be absolute.

See also *Marshall v. Rives*, 8 Rich. 85.

SECTION V.

THE PERIOD OF LIMITATION; HOW MEASURED; THE ULTERIOR LIMITATION; THE PARTICULAR LIMITATION; FIXED BY CERTAIN CONTINGENCIES OR CONDITIONS; WHAT MUST BE THEIR CHARACTER; MUST OPERATE AS CONDITIONS PRECEDENT TO THE VESTING OF THE ESTATE OF INHERITANCE; CASES AND AUTHORITIES CONSIDERED.

FIRST. THE ULTERIOR LIMITATION, BY WHAT PERIOD FIXED.

SECOND. THE PARTICULAR LIMIT, HOW DETERMINED.

THIRD. THE CONTINGENCY OR CONDITION MUST OPERATE AS A CONDITION PRECEDENT TO THE VESTING OF THE ESTATE OF INHERITANCE, AND CANNOT BE MADE TO OPERATE TO DIVEST THE ESTATE AFTER IT IS ONCE VESTED.

FIRST. THE ULTERIOR LIMITATION, BY WHAT PERIOD FIXED.

We have before seen, that the limitation over must not exceed in duration a life or lives in being and twenty-one years thereafter, at common law, to be measured from the time of the creation of the contingent interest. The time when the estate is to vest must be within that period. If it may possibly not be determined within that period, or in other words, may be possibly postponed beyond it, the limitation over, as we have seen, is void for remoteness. Some of the States have shortened the period, but have not changed the mode of fixing it. It is in all the States limited to a life or lives in being, and never merely by years or dates. New York seems to have the shortest period, it being only for two lives.

It may not be uninteresting to bear in mind the causes which led to the adoption of this mode of limiting the period. Originally, as we have seen, tenants in fee had no right to alien their estates without the consent of their landlords. Then came the commercial revolution, which resulted in giving the right of alienation to every tenant in fee. To that there was this rebound, that the tenant might suspend the right of alienation by creating contingent interests, and thus leaving the estate itself in abeyance for a time. The

tenant could not be restricted in his right to alien, but the estate could be left without a tenant in fee for a limited period; the consequence of which was, a suspension of alienation, for the very potential reason that there was no one who could say he owned the estate.

The reasons put forth for this suspension of ownership, and the consequent suspension of alienation, were the necessities and wants of families of children; the infancy of some and the helplessness and improvidence of others. It seemed hard to deny to a man the right to so fix his own property that it might become an unfailing source of support for helpless and improvident children. The courts were finally induced to sanction the practice to the extent of meeting those necessities. But they said, "you must not go beyond a life or lives in being and twenty-one years thereafter. That period will embrace all the members of your family, and give them time to attain the age of majority." This was judicial legislation and became a part of the common law. The New York legislature were less indulgent as to the period. They shortened up on the common law period, and allowed these precautionary provisions to embrace only two lives in being, which might include only a small part of the family.

One of the important questions which arose after this period of limitation was established, was whether a child unborn, but in progress of gestation at the death of the testator, was to be counted among lives in being at that time.

Among the early cases wherein this question was considered was *Reeve v. Long*, 1 Salk. 228.

There was a devise of land to the testator's nephew, Henry Long, for life, remainder to his first son in tail made, and so on to the second and third sons. For default of such issue, then to another nephew, Richard Long, and to his sons in the same order.

Henry married and died without issue, leaving his wife *enciente* with a son.

Richard took possession of the premises. Afterward the son of Henry was born, and by his guardian entered on

Richard. The latter then brought ejectment, and the court of King's Bench decided in his favor.

The court resolved: "1. That the remainder to the first son of A. is a contingent remainder, and must take effect during the particular estate of A., or, *eo instanti*, that it determines; that by consequence this remainder to the son became void by the death of the tenant for life before A. had a first son.

"2. That this was such a default of issue, or a dying without issue, that instantly the remainder limited over to B. vested in him, and he became seized in possession; and this cannot be defeated, nor the estate fetched back again, though A. has a son born afterwards."

This judgment was afterwards reversed by the House of Lords, that tribunal holding that the son unborn at the death of the testator should be regarded as among lives in being at that time.

The question was again passed upon in *Doe v. Clark*, 2 H. Bl. 399. The question there arose in this way: "There was a devise to B. for life, and after his decease to all and every such child or children of B. as shall be living at the time of his decease." The question was whether a posthumous child of B. should be treated as living at the death of the testator. It was decided that the child should be so regarded.

Lord Ch. J. Eyre thus stated the rule: "I hold that an infant *en ventre sa mere*, who by the course and order of nature is then living, comes clearly within the description of 'children living at the time of his decease.'"

The same rule was declared in *Stedfast v. Nicoll*, 3 John. Ca. 18. It was held in this case that the posthumous son took the estate in remainder, in the same manner as if he had been born in the life-time of his father.

This doctrine was made the law in England by a declaratory act, providing that posthumous children should be enabled to take, as if born during the life of their father. 10 Wm. 3 ch. 16. It has ever since been the established law of England.

So in New York, there is a statute provision that, "where a future estate shall be limited to heirs or issue, or children, posthumous children shall be entitled to take in the same manner as if living at the death of their parent." 1 R. S. 725, § 30. And by another provision, "relatives of the intestate, begotten before his death, but born thereafter, shall in all cases inherit in the same manner as if they had been born in the life-time of the intestate, and had survived him."

1 R. S. 754, § 18.

The same rule seems to prevail in all the other States.

See *Den v. Flora*, 8 Ired. 374; *Morrow v. Scott*, 7 Geo. 535.

This construction of the rule necessarily added to the twenty-one years, which was allowed for a child born to mature, nine months more for the period of gestation. Hence we have the common law rule of a life or lives in being, and twenty-one years and nine months thereafter, as a period beyond which contingent interests must not be limited.

But no term of years, independent of certain lives in being, is allowed as a limit. It is too remote, because it may exceed a life or lives in being when the contingent interest is created.

Boynton v. Hoyt, 1 Denio, 53

Where the common law period of limitation prevails, of a life or lives in being, and twenty-one years thereafter, a provision in the instrument creating the contingent interest, limiting the period to any number of years, after the prescribed life or lives, short of twenty-one, will be valid. At least it has been so held in England.

In *Cadell v. Palmer*, 1 Clark & Finnelly, 372, 421, 423, there was a limitation by way of executory devise, not to take effect until twenty years from the decease of the survivor of twenty-eight persons named, who were living when the will was made and when the testator died.

It was contended, on the one side, that the law did not permit a limitation of a fixed term of years. But the court decided that it was valid, when interposed in the place of the twenty-one years allowed by the common law rule. It was

not, however, claimed that any term of years would be permitted, except as a substitute for the twenty-one years following a life or lives, and then it must not exceed that period. Any term short of that might be substituted.

But it would seem that the twenty-one years, like the nine months, is permitted only when circumstances demand it, and not as an absolute term of time which shall be allowed in any event.

SECOND. THE PARTICULAR LIMIT ; HOW DETERMINED.

As yet we have only considered the ulterior limit, beyond which the particular limit must not go. It remains to consider the particular limitation, which, in each case, is the boundary line between the contingent and the vested rights. This may differ in each particular case, as it generally does, and necessarily must. The great variety of cases can be brought under the same general rules, in that respect, only in regard to some general principles.

1. The event or condition which is to limit the contingency must not be an immoral or an illegal one in its character. An interest limited to take effect in favor of any person named, when he shall murder some particular person, or be guilty of any other crime, would be void. So of any act, though not indictable as a crime, immoral in itself or in its tendencies.

2 Cruise Dig. 271, §§ 2, 3.

2. The event or condition must be one which must necessarily happen, or be fulfilled within the period prescribed, as the ultimate limit. In New York, it must not fall outside of the period of two lives in being at the time the contingent interest is created. Where the common law rule prevails, the period is a life or lives in being, no matter how many, and twenty-one years; and in particular cases nine months thereafter.

For example; a limitation to the issue of a living person would be within the rule of the common law; but a limitation to the issue of such issue would be void, because it might

go beyond a life or lives in being. There has been much discussion and criticism, to show that a possibility upon a possibility, was too remote to be valid. This is a refinement of words merely, and is resolved by considering the direct question, whether the event indicated must happen within the prescribed period. If the limitation is made to the issue of a person in life, there is no question that the suspension of the investment of the estate and the consequent suspension of alienation, does not transgress the limits of a life or lives in being, and is valid. But if the limitation be made to the issue of that issue, that is, to the issue of a person not yet born, then it is equally certain that the limitation transgresses the ultimate limit of a life or lives in being, and is void for remoteness.

The rule does not leave the question open to speculation, whether the limitation may, in fact, transgress the exterior limit. It is enough that it may pass beyond the limit of a life or lives in being, and the twenty-one years and nine months thereafter. If it does, or may do so, it violates the ultimate limit allowed to the suspension of estates of inheritance, and is void. The question whether it does or does not transgress the limit is to be determined in the first instance, and is not to await the development of facts. If the contingent event may not happen, or the condition may not be fulfilled before the exterior and ultimate limit is reached, the limitation is void. If it must, in the nature of things, happen before the exterior limit is passed, the limitation is valid.

There is a class of cases which have been held to create valid limitations in violation of the limits prescribed, which cannot be regarded as authority one way or the other, for no such question was raised, or seems to have been suggested.

The following case, in Connecticut, is an example:

In *Wheeler v. Walker*, 2 Conn. 197, there was a residuary devise of lands to two sons, "they jointly and severally paying to my two daughters" the sum of three hundred dollars each within one year after my decease. They entered upon

the demised premises, but failed to pay the sum required within the year. It was held that they fail to acquire any title to the land.

It was remarked by Swift, Ch. J., that "to entitle them to the land they are bound literally to perform the condition on which it was given, and pay the money by the time prescribed. Having failed to do this they have no right to the land under the devise. It reverts to the heirs of the devisor."

Afterwards, in another action, the devisee sought relief in equity, to be allowed to take the land upon the payment of the money; and relief was so granted.

Walker v. Wheeler, 2 Conn. 299.

The condition, which, in that case, was made to operate as a condition precedent, was contained in the general residuary clause of the will, and not in any specific devise of the lot in question, and was applicable to the personal as well as to the real estate. It was a case where, by accepting the will, the devisees and legatees incurred a contract obligation to pay the sums prescribed. The testator manifested no intention to make the payment of the money a condition precedent to the title of the land.

The time was there fixed to one year, within which the devisees might pay the money required. That requirement was construed by the court as a condition precedent, which held the fee in abeyance, or in contingency, until it was fulfilled. The right of alienation was, therefore, suspended for the fixed period of one year. As we have before shown, "the utmost limit" must be bounded by life, and "no absolute or certain term, however short, can be supported."

Boynton v. Hoyt, 1 Denio, 53.

That is a principle which has never been denied. It probably was overlooked in the example here referred to, because the period of time was short. Had it been a hundred years, instead of one, the decision might have been different. Yet the principle is the same, whether the term of time named is one year or one hundred years. Either is in viola-

tion of the rule, because the period must be bounded by human life. If a condition is attached, which requires fulfillment or performance, in order to vest the estate, and leaves it contingent in the meantime, the time of fulfillment or performance must be limited by a life or lives in being, and not by years.

The true disposition of such a devise would be to treat it as vesting the estate, and implying a covenant or obligation on the part of the devisee to pay the money within the time limited.

3. The contingent event, or the condition which is to change contingent to vested interests, must be such as not to terminate the particular estate or interest of the first taker. In other words, it must not be like a condition at common law, contrived to terminate the preceding estate for condition broken.

"It is of the essence of a remainder that it should wait for, and only take effect in possession, on the natural expiration or determination of the first estate."

2 Cruise Dig. 276, § 16.

This rule of the common law has been changed by statute in New York. It is provided that "a remainder may be limited on a contingency, which, in case it should happen, will operate to abridge or determine the precedent estate; and every such remainder shall be construed a conditional limitation, and shall have the same effect as such limitation would have by law."

1 R. S. 725, § 27.

THIRD. THE CONTINGENCY OR CONDITION MUST OPERATE AS A CONDITION PRECEDENT TO THE VESTING OF THE ESTATE OF INHERITANCE, AND CANNOT BE MADE TO OPERATE TO DIVEST THE ESTATE AFTER IT IS ONCE VESTED.

We have before alluded to this question, while considering the case of *Bromfield v. Crowder*, 4 Bos. & Pull. 313, and other cases. There was an intimation in that case, that if the contingent event could not operate as a condition precedent, it might operate as a condition subsequent; that the

first taker might take a vested interest before the contingency happened, and leave that contingency to operate as a condition subsequent. We have before generally referred to some of the inconsistencies of such a construction.

1. That mode of vesting the estate, and thus avoiding the contingency, is equally applicable to all contingent interests. Contingent estates are not subject to any division into classes in that respect. One case can be disposed of in that way as well as another. Hence, by the adoption of that rule, contingent remainders, and all other contingent interests, may be at once treated as vested, only subject to be divested by the happening of the contingency. This would put an end to the whole system of contingent remainders, with all the rules which have been contrived by courts and legislatures to regulate it. Once established on that basis, the system would be a new one, and would call for a different class of rules and principles in its administration.

But even this absurd result, common to all cases, would not present all the absurdities of such a theory. For example, take the very common case of a devise to A. and to B for life, remainder in fee to the survivor of the two; there is, under the system of contingent interests, merely a contingent remainder in either of the two, which can become vested only in the one who survives the other; and, in the meantime, neither can alien the estate, and neither is the stock of descent of the estate to his heirs. The vesting of the estate can never happen in both, but only in one of the two; the fortunate one, in that respect, to be determined by the death of the other.

Under the theory of vesting in one to be divested by the death of the other, both would be the stock of descent, both could alien by deed or devise; the heir, devisee or alienee of the one being subject to be divested by the heir, devisee or alienee of the other, who might live the longest.

The application of such a doctrine would result in a like absurdity, in every case where there was a contingent interest; for where such interest is created, there must necessarily be two or more parties who may take the estate, depending

upon which may live the longest, or depending upon some other contingent event. If we are to adopt the theory that the estate is to be treated as vested in the one, but to be divested in favor of the other by the happening of the contingency, the estate must also be treated as vested in the other in the same way. The theory makes no provision for preferring the one to the other in that respect; nor is there any principle upon which the one can be preferred to the other. The theory is an absurdity from whatever point it is viewed. In the case of a devise to two persons for life, remainder in fee to the survivor, this theory would vest the fee in both, to be divested from the one who first dies in favor of the survivor. A similar result would follow the application of that rule in most, if not all, contingent interests.

It is not only absurd in theory, but unsustained by the adjudicated cases. The cases usually cited as authority for treating contingent events as conditions subsequent, which may operate to divest the estate, are *Edwards v. Hammond*, 3 Lev. 132; *Bromfield v. Crowder*, 4 Bos. & Pull. 313; *Doe v. Moore*, 14 East, 601; *Phipps v. Ackers*, 9 Clarke and Finnelly's Reports, 583, and some others of less importance and more modern in date.

In *Edwards v. Hammond*, 3 Lev. 132, a copyholder of land surrendered to the use of himself for life, and after that to the use of his oldest son and his heirs, if he live to the age of twenty-one years: provided, and upon condition, that if he die before he comes to the age of twenty-one years, that then the estate shall remain to the surrenderer and his heirs. The surrenderer died, the youngest son entered upon the premises, and the oldest son, being of the age of seventeen, brought ejectment.

The question was, whether the oldest son had a right to the possession and profits of the premises before he arrived at the age of twenty-one years. The question was not whether the fee vested in him while he was within that age, but whether the rents and profits of the premises did not belong to him before that time. It was held that he was entitled to the

possession, subject to be defeated thereof by his death before he became twenty-one. The attaining twenty-one years of age was a condition precedent to the vesting of the fee only.

Bromfield v. Crowder and *Doe v. Moore* have been before noticed. The question in each of those cases was whether the first devisee was entitled to the possession of the premises before he became of the age, when by the terms of the devise he was to take the fee. There was no pretense that the fee was vested before that time. The point to be decided was whether the first devisees were entitled to the possession intermediate their becoming twenty-one years of age.

The true question embraced in this class of cases is well explained in *Phipps v. Acker*, 9 Clarke and Finnolly's Reports, 583.

There was a devise of certain land to trustees, in trust to convey to G. H. A. when and so soon as he should attain the age of twenty-one. He was twelve years old on the death of the testator. The true and only question in the case was whether he took such an interest in the premises, by the devise, as entitled him to the rents and profits during his minority.

It was said by Lord Chief Justice Tindal, in his opinion to the House of Lords, that "the cases on this subject appear to be resolvable into two classes; first, those in which the courts have relied on the circumstance that the estate, prior to the attainment of the age of twenty-one, has been given to some third person, either for the benefit of the devisee himself, as in *Goodtitle v. Whitby*, 1 Burr. 228; or for the benefit of some other persons to endure during the minority, as in *Boraston's case*, 3 Co. R. 16, and *Mansfield v. Dugard*, 1 Eq. Cases, 195; and secondly, those cases in which the estates are given over in the event of the devisee dying under twenty-one, as in *Edwards v. Hammond*, 3 Lev. 132, *Bromfield v. Crowder*, 4 Bos. & Pull. 313, and *Doe v. Moore*, 14 East, 601.

"The first class of cases goes on the principle that the subsequent gift over in the event of the devisee dying under

twenty-one, sufficiently shows the meaning of the testator to have been, that the first devisee should take whatever interest the party claiming under the devise over is not entitled to, which, of course, gives him the immediate interest, subject only to the chance of its being divested on a further contingency."

And he further said, "that on the question put to us, we are of opinion that George Holland Ackers, on the decease of the testator, took an estate in fee simple in the lands, subject to be divested in the event of his dying under twenty-one and without issue."

There was, however, no question in the case that made it necessary to decide whether the fee vested in him or not during his minority. The only question was as to his right to the rents and profits before the fee vested; and that was the view taken of the case by the House of Lords. George H. Ackers was not regarded as being vested with the fee during his infancy. His interest was regarded as one inferior to the fee.

Lord Brougham said: "I therefore arrived at the conclusion that, if the decree below was allowed to stand, it could only be rested upon the interest given to George Holland Ackers being an immediate vested interest, and not contingent; that it was an interest vesting *instanti*, but liable to be divested on the event happening of G. H. A. dying under twenty-one."

The interest here spoken of was the temporary one pertaining to his infancy, and one which could not survive him in case he should die before attaining majority.

Raney v. Heath, 2 Patton and Heath's reports (Va.) 206, is a case where this subject was elaborately discussed.

The clause of the will in question, in that case, was as follows: "I give and bequeath my estate, both real and personal, to my brother Benjamin B. Heath's children, providing either of them shall live to the age of twenty-one. If neither of them live to be twenty-one, it is my desire that my sister Lilly Raney and my sister Barbara B. Lee's children to have it equally between them."

On the death of the testator, the infant children of B. B. Heath claimed to have the use of the property during their minority, and filed their bill to have the same paid to them. On the other side it was claimed that the children took only a contingent interest, dependent upon their attaining the age of twenty-one years; and, that in the meantime, they had no title to the use of the property.

It was said by the court: "Strip this bequest of the proviso which immediately follows the gift 'providing either of them shall live to the age of twenty-one,' and read it as if it were a simple unqualified gift, followed by the limitation, 'if neither of them live to be twenty-one, it is my desire that my sister Lilly Raney and sister Barbara Lee's children to have it between them equally,' and it would have been a technical executory devise or limitation, and, as such, would have conferred a vested limited fee, subject to be divested or defeated by condition subsequent; and can there be a doubt that the testator intended first to give the estate to the first taker, but if all died before the age of twenty-one, to limit over to the second class of children."

It was further said: "It was intended to indicate the period of division, and not that of the vesting of the estate or interest."

The infant children of the first taker were decreed to have the use of the property during their minority. The fee could not vest until some one of them attained the age of twenty-one; and if all had died before arriving at that age, the fee would have gone over to the children of the sisters.

The view there taken relieves that class of cases of the perplexing questions about the fee being vested to be divested on the happening of the contingency. The devise, when so construed, is nothing more than the ordinary executory devise. It is a gift to the children of B. and their heirs, with a provision that if none of B.'s children attain twenty-one years of age, then over to the children of C. B.'s children would have the use and possession for life, and if they attained twenty-one would be vested with the fee. If they died before twenty-one the estate would go over in fee to the children of C.

So explained, that class of cases come within the theory which was applied by the court in *Tyson v. Blake*, 22 N. Y. 558, and *Norris v. Beyea*, 13 N. Y. 273, before considered in section IV of this chapter.

The contingency of attaining twenty-one is a condition precedent to the vesting of the fee; but it is not a condition precedent to the use or profits of the estate. There is no necessity for making it a condition subsequent to divest the fee, for the fee is not vested before the contingency happens. It seems to be generally true, of that class of cases, that the fee has not been in dispute. The contest has been about the possession or profits of the estate before the fee could vest. The fee has been in abeyance. What has been said, in the books, of vesting the fee, to be divested on the happening of the contingency, is mere speculation, with no practical foundation to rest upon. It is the tribute of prejudice to the antiquated feudal idea that the feudal law abhorred the abeyance of a fee, as nature is sometimes said to abhor a vacuum. Where there are no feudal lords, and no rents or services due from tenants in fee, as is the case in this country, abeyance is not horrible, for a limited time.

There is a very recent case, *Sheridan v. House*, decided in the New York court of appeals, and reported in 4 Keyes, 569, which assumes to vest a contingent remainder before the contingency happened whereupon it was to vest. The case arose upon the same deed of conveyance which was involved in *Moore v. Littel*, 40 Barb. 488, before cited, and presents substantially like facts. It assumes to vest the fee granted in remainder, to be divested, in case the grantees in remainder died before the contingency happened, upon which the remainder was to vest. This case does not belong to the class of cases just noticed, where the real question was as to the possession of the premises before the fee vested in any one.

There was a conveyance by deed to John Jackson "for and during his natural life, and after his decease to his heirs." John Jackson had several children. The question was, whether deeds of conveyance by the children, made before

the decease of the father, passed the estate; and whether the interest of the children passed by a sale on execution upon a judgment against one of them before the death of the father.

The majority of the court held that the estate was vested in the children before the death of the father, and was, therefore, alienable.

The conclusion is thus stated in the head-note: "This vested future estate of each child, though liable to be defeated by his death before that of his father, is, nevertheless, under our statute law devisable, descendible and alienable."

But "the purchaser under such sale takes, of course, only the same estate, subject to the same liability to be defeated, as was vested in the son (judgment debtor), from whom he derives."

If this decision is to become the law of the State, then contingent remainders and all other contingent interests have to a great extent ceased to exist in New York, in the eyes of the law. The opinion takes two positions, one directly opposed to the other. It is said of "a grant to A. for life, with remainder to the heirs of B.," that

"In such case the limitation over to the heirs of B. is by the common law wholly contingent. It is not only impossible during the life of B. to say who will be his heirs, and hence who will be entitled to claim under the limitation; but if B. is living at the death of A. the remainder will wholly fail, because it cannot take effect at the expiration of the precedent freehold estate upon which it is limited. This last result is now prevented by our Revised Statutes, 1 R. S. 705, § 34, and, therefore, the limitation over is operative, and whenever B. dies it will take effect for the benefit of those who may be his heirs. In such case, however, so long as B. lives (A. being also living), there can be no vested estate in remainder under our statutes, because there are no persons in being who would have an immediate right to the possession of the land upon the ceasing of the precedent estate; that is, if A. were to die to day, it would still be uncertain who are the heirs of B.,

and, therefore, there is no one who, under the grant, is entitled to the possession.

“But now suppose B. dies, then the estate would vest, and for the reason that there are now persons in being who, if A. dies to-day, will be entitled to immediate possession. Whether by the death of such persons, or by any other future event or not, their interest is vested according to the very terms of our statute.”

It cannot be denied that this was a correct statement of the law, as declared in this State by a course of judicial decisions, which embrace the entire period of the existence of the State.

Now we will look at the other position, as thus stated in the opinion :

“1. An estate is vested where there is a person in being who will take, if the precedent estate then terminates.

“2. An estate is contingent while the person to whom it is limited is uncertain, i. e., while it is uncertain who will take if the precedent estate then terminates.”

After stating those two propositions the opinion then comes to this conclusion :

“Thus John Jackson took a life estate, and every child of his, bearing to him such relation, that at any moment he would, if John Jackson then died, be entitled to immediate possession, and to hold in fee, had a ‘vested estate’ under our statute. It was vested because, by the death of John Jackson, the precedent estate terminates, and such child, then in being, becomes, *eo instanti*, entitled to immediate possession, which is the precise character of one who, in the language of our statute, has a vested future estate.

“This vested estate might be defeated, because such child might die before his father ; but the statute has, nevertheless, made his estate a vested estate, notwithstanding the grant under which he claims has annexed a further condition which may defeat it.

“In short, the statute has made this remainder (although its beneficial enjoyment depends upon the condition that he

survives his father) a vested remainder, liable to be defeated by a condition subsequent.

"Such an estate is, in its nature, devisable, descendible and alienable. (1 R. S. 725, § 35.) This is made a general rule, going much farther and embracing all expectant estates. In this particular case, the death of the party in whom it is vested before the termination of the precedent estate, would defeat it; but this does not change its legal character; it is still a vested estate, although death may defeat it. It is, therefore, alienable, subject to that contingency, and the deed of partition was, therefore, operative."

The reader is now in possession of both positions, and of the argument of the court, whereby it is assumed to be proved that an estate, which is contingent and all the time remains contingent, is, notwithstanding that contingency, a vested estate, subject only to be defeated by the contingency.

The reasoning, by which so remarkable a result was attained, is more after the manner of the schoolmen of the middle ages, than of the lawyers of modern times. It will be better understood by contemplating it in the syllogistic form, to which, as given in the opinion, it very nearly approximates.

We then have, as the first proposition of the argument, that every estate is vested "when there is a person in being, who would have an immediate right to the possession of the lands upon the ceasing of the intermediate or precedent estate."

1 R. S. 723, § 18.

The second proposition is, that every child of John Jackson had a right to the possession of the premises in question immediately on the death of John Jackson.

Therefore, every child of John Jackson had a vested remainder.

The court were mistaken in assuming that the statute referred to had changed the common law rule. The definition of a vested remainder there given is the common law definition. "The present capacity of taking effect in pos-

session, if the possession were to become vacant, universally distinguishes a vested remainder from one that is contingent."

2 Cruise Dig. 246, § 86.

We have before noticed the imperfection of this definition. It excludes all that class of cases where the contingency depends upon the same event that must necessarily determine the estate for life.

In the case under review, it is impliedly conceded that, if the precedent estate had not been limited to the life of John Jackson, the children of John Jackson, during his life-time, would have had only a contingent remainder. But as the precedent estate depended upon his life, the court held the result different. The distinction between the two positions of the court, before shown, all turns upon that point.

The fallacy of the judicial argument is found in the imperfection of the definition of a vested remainder, and the consequent imperfection of the major proposition of the logic upon which the decision is based.

That definition carried out would reverse the greater portion of the decisions touching contingent interests, which have been made during the last three or four centuries.

A devise to A. and B. for life, remainder in fee to the survivor, would vest the remainder in each of them, antagonistically, by the same process of reasoning. So a devise to A. for life, remainder in fee to B. if living on the death of A., and if not living, then to C., would vest the remainder in fee in B. before the death of A.; and in C. also.

It is not easy to conceive where the mischievous consequences of such a mode of construction would end, and where it would stop vesting contingent interests in all the parties concerned.

It might have changed the decision of the court had the definition of a contingent remainder, as found also in the statute, been taken into consideration.

In the same section where the definition of a vested remainder is found, it is declared of remainders, "they are contin-

gent, whilst the person to whom, or the event upon which they are limited, to take effect, remains uncertain."

1 R. S. 723, § 13.

Now, while John Jackson lived, it was uncertain who were to be his heirs. This is expressly conceded by the court. It was, therefore, during his life-time, uncertain that his children would ever be his heirs, because it depended upon their surviving him; and their interest remained contingent until his death, and was contingent when the deeds of conveyance were made by them.

It might also have affected the conclusions of the court, if they had kept in mind another common law definition of vested remainders. It is said, 2 Cruise Dig. 239, § 8, that "vested remainders, or remainders executed, are those by which a present interest passes to the party, though to be enjoyed in future, and by which the estate is invariably fixed to remain to a determinate person after the particular estate is spent."

The court are constrained to hold that, in the case under review, the remainder was not fixed to remain in the children of John Jackson, before his death. The contingency remained until his death, and the children who died before he did took no estate. How, then, can it be said the estate was vested before his decease?

In any view that can be taken of the distinction attempted by the court, founded upon the fact that the precedent estate was limited to the life of John Jackson, it seems to be absurd, because it has nothing substantial to rest upon. It was none the less uncertain who would be the heirs of John Jackson, because the precedent estate depended upon his life. The contingency was not at all affected by that fact; and it does not help the absurdity to say that the estate was to be divested in case the children did not survive the father. That is a mere artifice, that might be resorted to in any conceivable case, to change a contingent interest to a vested right, with as much propriety as in this case.

2. The laws of real property permit of conditions subsequent, that can be invoked to terminate an estate only when such conditions are inserted in the grant or lease which created the estate, at the time the grant or lease was made, and when those conditions are to operate in favor of the grantor or lessor, or his heirs or grantees, or devisees of the reversion. No tenant can, by will or otherwise, impose conditions on the estate, to change its tenure or subject it to forfeiture. Such was the rule of the common law.

In this country, where all estates in fee are allodial, no conditions subsequent, that may be made to operate to determine the estate, can be imposed by any one.

We have treated of this subject at length in another work, and there is no need of repetition here.

See Bingham on Real Estate, title "Termination of estates by conditions of re-entry or forfeiture," 270 *et sequitur*.

All the authorities which hold that a devise over is repugnant, after a devise which vests the estate in the first taker, are authorities against the theory of vesting, to be divested by the happening of any contingency, or the failure to fulfill any prescribed condition.

The cases wherein the contingency or condition has been spoken of as a condition subsequent, and not a condition precedent, are cases, for the most part, where no estate has been held to be divested, and where there seems to have been no discussion upon the point whether the contingency or condition could attach and operate as a condition subsequent. In the cases that have elicited discussion upon that point, the question has been whether the condition or contingency was precedent to the vesting of the estate, and necessary to happen or be fulfilled before it could vest. It was not pretended that the estate might vest and be divested thereafter.

There are cases, in addition to those already noticed, wherein the contingencies have been spoken of as conditions subsequent, without much, if any consideration, upon that point. An example or two, in addition to the cases before considered, will show the character of the dicta, which appear in the reports.

In *Montgomery v. Petrikin*, 29 Penn. St. R. 118, the testator had devised one-third of a tract of land in fee to his son Robert, another third in fee to his son James, and the remaining third to his son William, and had provided that at the death of the said William his share should be equally divided between Robert and James, with a provision that if William should recover from the malady under which he then labored, then he was to hold all the property devised to him for his own benefit and disposal."

William was insane at the death of his father, and died so, having never recovered from the malady. During his lifetime his brothers divided the lands between themselves, and each entered upon his part. James died leaving one child, which died soon afterwards. The surviving brothers and sister brought ejectment to recover their portion of the whole land, as the heirs at law of the deceased child of James.

The court held that the devise over to Robert and James, after the death of William, constituted a vested remainder; that the estate to arise in the event that William became sane, was only a conditional limitation on the fee, and that the partition between James and Robert was valid.

The court said: "The fee is vested, subject to be defeated, if ever the event contemplated should happen."

This was the ordinary case of a devise to William, with an executory devise over to his brothers, in case William should die without recovering from his insanity. The fee was in abeyance as to William's share, until his death, for he never became sane.

This case is peculiar in this respect. In other cases it has been said the estate was vested in the first taker, and divested only to go to the second devisee. Here, it is the devise over that is said to be vested, which was subject to be divested in favor of the first taker, upon the happening of the contingency. Now, if the devise had been to Robert and James first, and then over to William in case he became sane, the construction of the court would appear more plausible. As it is, it is absurd to attribute to the testator the intention to

vest the estate in the devisees over during the life-time of the first taker. It is a plain disregard of the language of the will.

Roome v. Phillips, 24 N. Y. 463, before cited, is a case where a child was said to take a vested remainder to be divested only on his dying under the age of twenty-one. That point, however, elicited no discussion.

This belongs to that class of cases where the question was one which related to the possession or enjoyment of the property before the contingency could happen, if it be held there was a contingency.

The question whether children took vested remainders or not, arose in *Blanchard v. Blanchard*, 1 Allen (Mass.) 223. The testator in that case devised, 1st, to his wife all the income of both his real and personal property during her natural life; 2d, to his five children, as follows: "All the property, both real and personal, that may be left at the death of my wife, to be divided equally between the last five named children; and provided, furthermore, that if any of the last five children die before my wife, then the property to be equally divided between the survivors."

It was held that the children named took a vested remainder.

The court placed their decision upon the authority of *Doe v. Moore*, 14 East, 601; *Smither v. Willock*, 9 Ves. 233; *Doe v. Nowell*, 1 M. & S. 327, and *Ray v. Enslin*, 2 Mass. 554.

The last clause of the will was regarded as the only provision which could make the devise contingent. It is said: "There is no doubt, that if the effect of this clause is to limit the remainder to such of the children named as should survive their mother, then it is a contingent remainder."

They sought to avert that result by regarding it "as a devise in fee to the five children, subject to be divested upon a condition subsequent, with a limitation over on the happening of that condition; that the limitation over would have taken effect, if at all, only as an executory devise; and as the contingency never happened the fee became absolute."

The court, in this case, were evidently influenced by the practical results. As all the children survived the wife,

there was no apparent call for any decision upon the provision, which was said to be an executory devise in favor of the survivors.

It is a contradiction in terms to say that an estate can be vested in one person to pass by divesture to another. The word *vest*, as applied to estates, means a *fixed* right of either present or future enjoyment. All the authorities concur in holding that an estate is vested when there is a present fixed right of future enjoyment.

The termination of estates for condition broken, in favor of the lessor or reversioner, depends upon rules and principles which have no application to contingent remainders, or to contingent interests of any kind.

SECTION VI.

CAN A CONTINGENT REMAINDER CONSTITUTE THE PARTY TO THAT INTEREST THE STOCK OF DESCENT UNTIL THE REMAINDER HAS BECOME VESTED BY THE HAPPENING OF THE CONTINGENCY? CASES AND AUTHORITIES UPON THAT QUESTION EXAMINED AND CONSIDERED.

1. This question, put in the above form, will be answered in the negative by those who have any considerable knowledge of the subject. The idea that one can become the stock of descent, that is, the source through which others are to derive title to an estate of inheritance, who never had any title himself, is an absurdity. The party who has only a contingent interest is not the tenant of the estate, because he is not the party of the second part to the grant or lease which created the estate. He has only a possibility that, upon the happening of the prescribed contingency, he may become the tenant. He has no estate, but only the chance of having one. It is idle to contend that a person thus situated can be the source through which the estate of inheritance can pass to his heirs.

The absurdity of the doctrine that a contingent remainder is descendible, is not abated in degree or character, by looking at it under the light of the authorities; for, no doubt,

whoever has the estate so that it may pass from him to his heirs, upon his death intestate, has it so completely that he may alien it at pleasure. Where an estate is descendible it is also both assignable and devisable. This last is a proposition universally conceded.

The only way under the common law, as we have before shown, in which the right of alienation of an estate of inheritance could be suspended, even temporarily, after the enactment of the statute *quia emptores*, was by the creation of a contingent interest, either by the way of a contingent remainder, or an executory devise, or a conveyance to uses. Now, if a contingent remainder or an executory devise so far vests the estate in the party named to take contingently, that he will become the stock of descent of the estate itself upon his death intestate, then a contingent remainder, whether created by devise or otherwise, or an executory devise, cannot suspend the right of alienation for one moment. No interest of that kind could then be void for remoteness. The common law rule, which forbids the creation of estates in expectancy, that shall suspend the power of alienation for more than a life or lives in being and twenty-one years thereafter, and the statutes prescribing like rules, varying only in the limit of the period, where they vary at all, are then purposeless and without effect. So, also, the numerous reported decisions have all been founded in error, if it be true that the party in interest to a contingent remainder, or an executory devise, or other contingent interest in an estate of inheritance, is so far the owner of the estate as to be the stock of descent. The time, labor, expense and learning which have been devoted to the distinctions between contingent and vested remainders, and to determine to which class the different cases litigated belonged, have, then, all been spent in vain; for, if a contingent remainder constitutes the party in interest, the stock of descent in the estate, there is no practical difference between a contingent and a vested remainder, before the contingency happens.

But yet, absurd as the notion obviously is, it is proclaimed in *Savage v. Pike*, 45 Barb. 468, that it is "an error to sup-

pose that, even by the common law, all contingent remainders are not descendible and devisable."

And the doctrine was expanded in that case so as to embrace executory devises, as well as contingent remainders. It was declared that a limitation over, whether considered as a vested remainder, a contingent remainder, or an executory devise, was equally descendible, it being an expectant estate.

It is not difficult to perceive the source and origin of this comparatively modern notion that a contingent remainder is descendible and devisable.

One of the early cases reported, touching this question, is *Goodtitle v. Wood*, Willes, 211. There was a devise in that case to A. and his heirs, with a qualifying provision that if A. should die before twenty-five, without heirs of his body, then to B. and his heirs. The devise over was held to be a good executory devise, and that, if B. survived the devisor, the property would go to B.'s heirs, although B. died before the contingency happened; that is, before the death of A. under twenty-five.

It is not necessary to sustain that decision to hold the doctrine that B. took a descendible estate. He having died before the contingency happened, the estate of inheritance in the land did not vest in him. He did not become the stock of descent in the estate, and his heirs did not take by descent from him, but as purchasers under the will. It is an instance where the word *heirs* was taken as a word of purchase, and not by way of limitation.

Supposing in that case B. had not been named as a contingent devisee, but the devise over had been made to the heirs of B. alone, the result would not have been different. The death of B. before the contingency happened, would have determined who the heirs of B. were, and they would have taken under the devise, and not by descent from B.

There is a similar case in *Barnitz's Lessee v. Casey*, 7 Cranch, 456. There was in that case a devise of certain lands to J. B. Hammond and his heirs, with a provision that if he should die under age, and without issue, then over to John M'Con

nell and his heirs. Hammond died under age and without issue, but M'Connell had died before him. The plaintiffs claimed to recover the land as the heirs at law of M'Connell under the executory devise over.

It is said by the court, that "it seems very clear that, at common law, contingent remainders and executory devises are transmissible to the heirs of the party to whom they are limited, if he chanches to die before the contingency happens. In such case, however, it does not vest absolutely in the first heir, so as upon his death to carry it to his heirs at law, who is not heir at law of the first devisee, but it devolves from heir to heir, and vests absolutely in him only who can make himself heir to the first devisee at the time when the contingency happens and the executory devise falls into possession."

The term "first devisee," there used, must have been intended to apply to the devise over, and to mean that on the death of M'Connell, before the happening of the contingency, so that the estate could vest in him, his heirs at law should be entitled to take as the second devisees over. The explanation given by the court makes it clear that they did not treat the plaintiff as entitled to take by descent from M'Connell. The word *heirs* of M'Connell was evidently construed to indicate who was to take as devisee over in case M'Connell died before the contingency happened.

Smith v. Pendell, 19 Conn. 107, is of that class. The testator in that case devised all his lands to his granddaughter, with a provision, as follows: "But if the said Elizabeth (the granddaughter) should die, leaving no natural heirs, my will is that the same shall go to my said daughter-in-law, Hannah Smith," the mother of the granddaughter.

Elizabeth entered into possession of the premises, and died without ever having had a child. But while she was in possession the said Hannah Smith executed and delivered to her a quitclaim deed of all right, title, interest, claim and demand whatever, which she had by or under the said will. After the death of Elizabeth this action was brought by Hannah Smith to recover possession of the premises, claiming title

under the said will. The question was whether the quitclaim of Hannah to Elizabeth was valid and effective.

It was contended on the part of the plaintiff, that when the deed was executed Elizabeth was alive, and Hannah had no interest in the land, but only a naked possibility, which could not be affected or conveyed; and that the interest which passed on the death of Elizabeth, without children, was one which did not exist in Hannah when she executed the deed, and was not, therefore, extinguished by the deed. The court decided that the deed operated to release Hannah's rights to Elizabeth.

It requires no argument to show that Hannah, at the time of executing the quitclaim deed, had no estate in the premises. In other words, there was in her no vested remainder. While Elizabeth was alive it was uncertain whether her mother would ever be entitled to the estate, because Elizabeth might die leaving natural heirs. This was so understood and conceded by the court. It was said: "We do not think Hannah Smith had any such vested or present interest in this estate as could by her deed be conveyed to a stranger; but we believe she had, under the will of David Smith, a contingent remainder. We cannot, in this respect, distinguish this case from the case of *Hudson v. Wadsworth*, 8 Conn. 348."

The court then intimated upon what ground the decision might be made to turn, as follows:

"It is true, if Hannah Smith, when she executed her deed of release, had nothing more than a possibility of interest, such deed was inoperative to extinguish her future rights even after such a possibility had ripened into certainty; and though the releasee was in possession under a title, because a mere possibility, unaccompanied with some present interest, can neither be granted, devised or released, although it may be reached by force of an estoppel in a deed with covenants."

It was not necessary for the court to have gone any further in order to sustain the decision than the doctrine of release or of estoppel. The deed did not purport merely to release the then present right of Hannah Smith. It was more than

a quitclaim deed. By its very terms it released not only all present rights she then had, but all her rights, whether present or future, vested or contingent, "under the will of David Smith, or in any other way." Language could not have made the release more specific, or more comprehensive, than it was. Hannah Smith was, therefore, estopped by her contract to claim further under the will, as effectually as though she had executed a deed with covenants of warranty. The principle of estoppel referred to by the court was applicable to the release, and it was not necessary to seek further grounds in the doctrine of remainders upon which to base the decision. And had the court, in giving reasons for the decision, gone no further, there would have been nothing in the case calculated to mislead in regard to the established distinction between a vested and a contingent remainder. But they undertook another course of argument. It is said in the opinion: "The right of Hannah Smith, therefore, was more than a naked possibility like that of an heir apparent; it was an interest in the estate, though a contingent one. Such an interest is descendible, and if not devisable at common law, it was made so by the English statute of wills."

Now it was possible that Elizabeth might die leaving natural heirs; and Hannah, when she executed the release, had no right to or in the premises, except what depended upon that possibility. How could it be truly said, then, that she had more than a possibility of interest. Had the devise been to Elizabeth during her life, remainder in fee to Hannah, then there would have been no doubt that Hannah had a vested remainder, not only descendible, but devisable and assignable. Did the provision in favor of the natural heirs of Elizabeth have no effect in that respect upon the rights of Hannah? If not, then there is no substantial difference between a vested and a contingent remainder. Such a result would seem to be sufficient to satisfy any one, who has knowledge of the laws of real property, that the contingent remainderman is not so far a party to the estate of inheritance as to constitute him the stock of descent, in case of death

before the happening of the contingency, which is to vest the estate in him.

The case of *Pelletreau v. Jackson*, 11 Wend. 110, is an authority that the interest of an executory devisee cannot be released before the contingency happens and the interest becomes vested.

That case involved the rights of devisees under the will of Medcef Eden, senior, which will was also the subject of construction in *Anderson v. Jackson*, before cited. There was a devise to two sons, with a provision that if either should die without lawful issue, his share should go to the survivor. Before the contingency happened, upon which the executory devise over depended, the two sons executed a release to a third person, of all their right, title and interest, of, in and to the said lot of ground. Joseph, one of the two sons, died without issue, after this release was executed, leaving him surviving, Medcef Eden, junior. The question was whether Medcef Eden, junior, had released his rights so as to be estopped or barred from claiming the estate under the devise over.

It was held "that Medcef Eden, jr., at the time of the assignment, having a mere naked possibility of interest in the premises, and not a right *in esse*, such possibility was not the subject of release, and that the release being without warranty, Medcef Eden, jr., and those claiming under him, are not estopped from setting up the title which devolved upon Medcef Eden, jr., on the happening of the death of Joseph Eden."

There was a similar decision in *Jackson v. Waldron*, 13 Wend. 178, arising out of the same will, and the same or a like transaction.

A release by one who had no interest at the time, was held not to affect an after-acquired right, in *Jackson v. Bradford*, 4 Wend. 619.

The action was ejectment. The plaintiff claimed title by a sale and purchase under execution upon a judgment against William M. Price, rendered in 1818. The judgment was

revived in 1825. The father of William M. Price was the owner of the premises, and died seised in 1821; when the son, William M. Price, succeeded to the title by descent from his father.

The defendant relied upon a deed of conveyance from William M. Price, made in 1820, before the death of his father. The deed purported to sell, convey and quitclaim, not only all the right and title to the premises of the said William M. Price, which he then had, but all that might accrue to him on the death of his father. Expectant interests were, therefore, expressly embraced in the deed.

The court gave judgment for the plaintiff.

It was said by Marcy, J.: "When these deeds were executed, Price had no title or claim to the premises, and could, therefore, convey no right to them. *Qui non habet, ille non dat.* A grant by a person who has no estate, as an heir in the lifetime of his ancestor, will not pass any estate."

The court, then, distinguish the cases where there is a warranty of the title, upon which the maker of the deed might be held liable to an action, should the grantee be deprived of the land on the ground of want of title in the grantor.

It is said: "Where the deed is by warranty, the warranty will rebut and bar the grantor and his heirs of a future right. This is not because a title ever passes by such a grant, but the principle of avoiding circuitry of action interposes and stops the grantor from impeaching a title, to the soundness of which he must answer on his warranty."

This is an old rule.

Co. Litt. 205a.

It has also been held that a man may release a claim, although he could not assign or transfer it. This doctrine was proclaimed in *Archer v. Brokenham*, 11 Mod. 148, as follows: "But there is no case in all the law that, by any legal conveyance at common law, a man could convey lands that he had no right to, nor was in possession thereof, at the time of such conveyance."

"Yet the law has allowed releases of rights, which are in the nature only of possibilities, that a man may release to him that has the possession a possible right only, though it does not allow him to transfer or convey away to a stranger such a right; and that is the reason the law allows a man to release an executory interest in a term which he has devised to him, and is in the nature only of a possibility; but yet, he cannot assign it away to a third person, though he may, as I said before, release this right to the possessor of the land by way of extinguishment. So that the rule of construction of conveyances at common law will be the true rule to expound this statute."

So in *Comstock v. Smith*, 13 Pick. 116, where the grantors by deed conveyed all their right, title and demand in the premises, with a covenant of warranty "against all persons claiming by, from or under them, and not otherwise," it was held to pass only such rights as the grantors then had, and not to affect any future estate that might come to them; and that the covenant of warranty, as it existed in that deed, did not estop them from setting up any title that they might thereafter acquire.

It was said by the court: "By such a grant, with a general warranty, nothing passes, nor, indeed, can possibly pass, excepting the title, which the grantor has at the time of the grant; but he is estopped to set up a title subsequently obtained by him, because if he should recover against his grantee, the grantee in his turn would be entitled to an action against the grantor to recover the value of the land."

The covenant of warranty, in order to work an estoppel against the covenantor, in such case, must be such that, setting up and sustaining an after-acquired title, would result in a breach of the covenant, so as to make the covenantor liable to an action.

It seems to have been sometimes claimed that the common law had been so changed by statute in New York, that contingent interests were descendible, devisable and alienable, equally with vested. It is true, there is a provision of the

statute declaring that "expectant estates are descendible, devisable and alienable, in the same manner as estates in possession."

1 R. S. 725, § 35.

There is, however, nothing in that provision to require a construction to embrace contingent estates and contingent interests, equally with vested; while section fourteen of the same chapter plainly and expressly declares otherwise. The language is: "Every future estate shall be void in its creation, which shall suspend the absolute power of alienation for a longer period than is prescribed in this article. Such power of alienation is suspended when there is no person in being by whom an absolute fee in possession can be conveyed."

Reading both sections together, it is evident the statute referred to does not change the common law rule in that respect. It is only vested remainders that come within the provision, and are descendible, devisable and alienable, like estates in possession.

Moreover, the question might be raised, that the legislature could not make a party the stock of descent, who was not vested with the estate, and could not give the power to sell an estate to a person who did not own it. The legislature may make any interest a man has descendible, and may give him power to alien it. But the legislature cannot bestow that quality upon what he has not, nor give him power to alien what is not his.

A construction of the statute in question, to embrace contingent interests, as descendible, devisable and assignable, would lead to great absurdities. There are always two or more parties to every contingent interest, who may, the one as well as the other, be said to have an estate in expectancy. The character of a contingent interest does not permit it to be otherwise. Whenever one person is not certain to have the estate, there is always some one else who has a chance to have it, and who will take it on the failure of the other. If the one is embraced within the statute, the other must be;

and then we have the estate, descendible, devisable and assignable, in two, if not more, distinct and opposite parties. There is no rule of construction which requires so absurd an intention to be attributed to the statute in question.

2. But while there seems to be no good ground for asserting that he who has only a contingent remainder, or a contingent interest, in an estate of inheritance, can be treated as the stock of descent, or as so far the owner of the estate itself, as to enable him to alien it by will or otherwise, the rule may be otherwise, in some respects, in regard to the contingent interest itself. The contingent interest itself may, in some cases, be the subject of sale or release. The authorities have made a discrimination, in that respect, between the estate of inheritance itself and the contingent right, the chance, the expectation of having it, dependent upon some contingency which is not certain to happen. It is only the latter interest that can be sold or released by the party who holds it; and in no case has it been held that the party who only has such a contingent interest can sell the estate itself and convey it. He may sell or convey what he has, but he cannot sell and assign what he has not. Neither legislatures nor courts can bestow upon him the right to sell and transfer what is not his. Otherwise, the person who did own, might be deprived of his property without due process of law.

Trull v. Eastman, 3 Met. (Mass.) 121, is a case in point, to illustrate the distinction between releasing the contingent interest and the estate itself.

It was held in that case that "a release by an heir apparent of his estate in expectancy, with a covenant, that neither he nor those claiming under him, will ever claim any right in the same, is, if made fairly and with the consent of the ancestor, a bar to the releasor's claim thereto, by descent or devise, after his ancestor's death."

The distinction between the estate itself and the chance, or expectation of some time having it, is very clearly stated in 2 Story's Eq. Jur. §1040, b., as follows:

“Contingent interests and expectancies may not only be assigned in equity, but they may also be the subject of a contract—such as a contract of sale—when made for a valuable consideration, which courts of equity, after the event has happened, will enforce. But until the event has happened, the party contracting to buy has nothing but the contingency, which is a very different thing from the right immediately to recover and enjoy the property. He has not, strictly speaking, a *jus ad rem*, any more than a *jus in re*. It is not an interest in the property, but a mere right under the contract. Indeed, the same effect takes place in such cases, if there be an actual assignment of a present interest; for, in contemplation of equity, it amounts not to an assignment of a present interest, but only to a contract to assign when the interest becomes vested. Therefore, a contingent legacy, which is to vest upon some future event, such as the legatee’s coming of age, may become the subject of an assignment, or a contract of sale. So even the naked possibility or expectancy of an heir to his ancestor’s estate may become the subject of a contract of sale or settlement; and in such case, if made *bona fide* for a valuable consideration, it will be enforced in equity after the death of the ancestor, not, indeed, as a trust attaching to the estate, but as a right of contract.”

But while the possibility or chance to have an estate may, under certain circumstances, be made matter of commerce or of release, there is nothing therein which can descend to heirs, as the laws of inheritance now exist; for, as before shown, to constitute a hereditament, requires a vested right in an estate; and to become the stock of descent a person must be vested with that vested right. The chance, the mere possibility of sometime to inherit an estate, is not a hereditament. It may be sold or released, but can never descend from the ancestor to the heir.

SECTION VII.

THE RULE IN SHELLEY'S CASE; ITS EFFECT.

The rule in Shelley's case, 1 Coke R. 219, 227, is thus stated :

"When the ancestor takes an estate of freehold, and in the same gift or conveyance an estate is limited, either mediately or immediately to his heirs, either in fee or in tail, the heirs are words of limitation of the estate, and not words of purchase."

The rule is stated in *Tallman v. Wood*, 26 Wend. 18, as follows :

"Where land is given by deed, or will, to a person for life, and after his decease, remainder to his heirs, the word *heirs* is to be construed as a word of limitation merely, and vests the fee of the estate in the first taker."

A more direct expression of the rule is, that a conveyance by deed or devise to a person for life, and remainder to his heirs, is, in legal effect, the same as though the conveyance was to him and his heirs.

The reason of the rule was, that the superadded words did not vary the course of descent. It was conceded that "super-added words of limitation, varying the course of descent, operate as words of purchase."

By the rule in Shelley's case, the word "heirs" was construed to indicate the quantity of the estate conveyed to the person named to take for life, signifying that he took an estate in fee in contradiction of the express language of the devise that he was to take for life only.

The avowed policy of the rule was to avoid the suspension of the right of alienation, which a literal construction of the words used effected. Where there is a gift of land to one for life, and then to his heirs, the fee is in abeyance during the life of the first taker. The remainder in fee is contingent, awaiting his death, when it vests as soon as his heirs are determined. The rule in Shelley's case avoided that result by making the first taker the owner in fee, and ignoring the word heirs, except that it was construed to indicate that he

who was named to take for life really was to take a fee. The courts did not then, as in *Sheridan v. House*, attempt to avoid the perpetuity, by calling the estate vested, subject only to be divested, on the happening of the contingency. That kind of artificial construction might have rendered the rule in Shelley's case unnecessary, and would have been more effective, for it would have cured all contingencies. When, however, the limitation over is to the heirs of any other person than the first taker, or when there is any other provision superadded which makes the disposition different from the established course of descent, the rule in Shelley's case does not apply, even at common law.

Tallman v. Wood, before cited, is an example of that class.

There was in that case a devise in trust to the executors for the use of children, with directions to divide the estate among the children then alive, equally; and if dead, among their lawful issue, and to convey the same by deeds; and in each deed it was provided that a clause should be inserted, limiting such grant or interest to the grantee for life, with remainder over to the right heirs of such grantee, their heirs and assigns forever.

The will in that case took effect by the death of the testator, previous to the abrogation of the rule in Shelley's case by the Revised Statutes of New York in 1830. But the court held that the rule in Shelley's case did not apply, because an executory trust was created, and, consequently, a court of chancery, within the exception to the rule in Shelley's case, might effectuate the manifest intent of the testator, that the children of the testator should take only a life interest in the estate devised, and that the remainder should go to the heirs of the children.

The origin of the rule in Shelley's case is given in *Doe v. Laming*, 2 Burr. 1106, by Lord Mansfield, as follows:

"This maxim was originally introduced in favor of the lord, to prevent being deprived of the fruits of the tenure, and likewise for the sake of specialty creditors.

"The ancestor, had the limitation been construed a contingent remainder, might have destroyed it for his own benefit. If he did not destroy it the lord would have lost the fruits of his tenure, and the specialty creditors their debts. Therefore, the law said: 'Be the intention as it may, where an estate is given to the ancestor and his heirs, the fee shall vest in him.'"

Yet, at common law, that rule was held to be subject to the intention of the donor or testator. In a case cited by Lord Mansfield, in *Doe v. Laming* (*King v. Melling*, 1 Vent. 231), the testator devised "to his eldest son for life, *et non aliter*, and after his decease to the sons of his body." The rule in Shelley's case was held not to apply, because of the words "*non aliter*." The son was, consequently, held to take only a life estate. And where the devise was to J. B. for his life *only*, and after that to his issue, J. B. was held to take a life estate and not the fee, by reason of the words "*for life only*." The word *only* was construed to indicate the testator's intention to bestow only a life estate in J. B.

It is evident that the rule in Shelley's case was only a rule of construction, based upon the assumed intention of the donor or devisor. A devise to A. and his heirs was construed then, as now, to give the fee to A. The word *heirs* served only to indicate the intention to give the fee, instead of an estate for life, or at will, as the devise would have been construed at common law, without the word *heirs*. The rule in Shelley's case construed a devise to A. for life, and after that to his heirs, to express the same intention as the devise to A. and his heirs. There was a plausible foundation for that rule, to be found in the fact that the two expressions were practically of the same meaning, at common law, before alienation of an estate in fee was permitted. Before that time, the practical division of an estate in fee was a life estate to the tenant in possession, and then to his heirs. That would be the practical division now, if we were to take from the tenant in possession all right of alienation, testamentary and otherwise, and from his creditors all right to resort to

the land to secure or satisfy their debts; and it could not vary the meaning to expressly limit the fee to the tenant in possession for life, and after that to his heirs, instead of limiting it to him and his heirs. Practically, under such a state of the law, the two modes of expression would mean the same thing. We find, therefore, a plausible foundation for the rule in Shelley's case, in the very nature and character of an estate in fee, as such estates existed in the feudal law; and the distinction between the two modes of expression, wherever a distinction has been attempted, followed as a consequence of the innovations, whereby estates in fee were made subjects of commerce, and liable to be sold or taken to pay the debts of the tenant.

It is not improbable that the donation or devise to one for life, and after that to his heirs, may have been first resorted to for the purpose and with the design of securing the heirs against a diversion of the estate from them, by the alienation thereof by the tenant in possession, or by proceedings at the suit of creditors; and it is not improbable, as intimated by Lord Mansfield, in the case before cited, that the courts may have been influenced in adopting the rule in Shelley's case, by the disposition to defeat such designs of donors or devisors. But still it is manifest that, in so doing, they did not mean to depart from the general rule that the intention of the donor or devisor should control, when clearly indicated by direct expression or by implication, to bestow only a life estate upon the first taker, with a contingent remainder over to his heirs.

It is true that some law writers of reputation have contended, that the rule in Shelley's case was independent of the intention of the donor or devisor, and was, in all cases, absolute and imperative. But no such absolute rule is sanctioned by the adjudicated cases, or can be sustained, consistently with the general principle, that the intention of the donor or testator must be allowed to control in all cases, when it does not conflict with any established rule of law.

The tendency, perhaps, is towards regarding mere rules of construction, which are applicable to particular phraseology

gies, as arbitrary rules to fix the meaning, independently of the intention of the party using them, as manifest from other words used in the same instrument. It may, however, be trusted as a safe rule to follow, in all cases of construction of contracts, conveyances or wills, that the intention of the parties manifested by the reading of the whole instrument together in the light of attending circumstances, must control the meaning; and this general rule applies to the rule in Shelley's case.

It may be said, in conclusion, of this subject, that where the rule of construction of Shelley's case has been changed, as in New York, and many other of the States, a conveyance, whether by deed or will, to one for life, and after his decease to his heirs, produces the effect which the language plainly indicates. The first taker takes a life estate only, and the remainder is contingent, awaiting the death of the first taker, when it immediately vests in his heirs; and where the rule of Shelley's case prevails, the first taker takes the fee absolutely, unless there is other language in the instrument, plainly indicating that the intention of the donor or devisor was that he should have only a life estate; when the intention must be carried into effect.

The rule in Shelley's case is not entitled to as much consideration in this country as in England, because it is not as important in its bearings upon the rights of the different parties connected with estates in fee. It makes but little, if any difference, here, whether parties take the fee by descent or by purchase. There are no feudal lords to suffer loss in the fruits of their tenure, here, as in England, by reason of the estate passing by purchase instead of by descent; and the creditors of the devisor are as well protected in the one event as in the other. The only inconvenience which can result from construing such gift or devise, as a gift to the first taker for life, and after that to his heirs, is, that it places the fee in abeyance, and suspends the power of alienation during the life-time of the first taker.

CHAPTER VII.

THE LIABILITY OF THE HEIR INCURRED BY HIS
SUCCEEDING TO THE ESTATE OF THE ANCES-
TOR.

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LIABILITY OF THE HEIR UNDER THE FEUDAL LAW. ITS CHARACTER, RULES AND PRINCIPLES EXAMINED.

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SECTION I.

LIABILITY OF THE HEIR UNDER THE FEUDAL LAW. ITS CHARACTER, RULES AND PRINCIPLES EXAMINED.

At common law the heir, upon succeeding to the possession of the estate of which the ancestor had died seised, became personally liable to perform the services, pay the rents and fulfill all other obligations imposed upon the estate by the grant or lease which created it, to the same extent and in the same manner as the ancestor had been liable while he was the tenant of such estate. The chief lord paid rent to the king, under whom he held the land as vassal or tenant. The next tenant, in the order of gradation, paid rent to the chief lord under whom he held. The tenant of the chief lord, when he had leased in fee to a third person, became the lord of that third person, and was distinguished from the *chief lord* by the term *mesne lord*. His tenant paid rent to him; and so on, to the end of the several leases in fee, which succeeded each other upon the same premises. We are now speaking of the common law as it existed in England before the enactment of the statute *quia emptores* in 1290, and when there was no limit to the number of estates in fee which might exist in the same premises.

Each generation of tenants succeeded to the same status of the preceding generation, with all the benefits and all the burdens. There was no shade of change or difference in that respect between one generation and another, and no possibility of any change or modification, according to law. Society, as thereby organized, was a machine made to run in certain grooves. No individual member, from the slave to the king, selected his calling or his place. The law selected it for him, and placed him there, and kept him there. Except the positions occupied by the two extremes of society, the king and the slave, the intermediate grooves were stamped on the land by the very grants or leases under which the land was held. Some modern essayists have supposed that this was a substitution of contract for status,

because the several gradations of service were based upon the contracts of lease. They fail to comprehend the subject in its full extent. They do not discriminate between the obligations to labor, imposed by the law, as a consequence of one's own contract, and obligations to labor imposed by law, because of contracts made by one's ancestors, perhaps centuries before he was born. When the law requires one man to be the servant of another, without ever having given him the opportunity to exercise any volition about it, it will hardly be denied that the law has fixed the status of that individual. It cannot change the character of the act, that it is based upon the contract of some other party. Personal slavery is none the less slavery, because possibly some ancestor of the slave may have contracted for the service. The condition is equally an arbitrary status fixed by law.

Such was the character and result of the feudal contract of lease in England before the statute *quia emptores*. It was as binding on the generations which succeeded as on the generation who made the contract. The continuing obligation was a fundamental part of the institutions of the feudal government, and was indispensable to the very existence of that kind of government. It was a division of the people into classes; governing and subject classes; and the allotment of each individual, soon as he was born, to the place in which he was to live and move and die; and to which his children were to succeed him in passing through life to death during all the generations. Hence the succession was imperiously forced upon the heir. He could not avoid it; it was a rule essential to feudal policy.

We have here alluded thus briefly to the feudal law bearing upon the subject of descents of real estate, as it existed in England before the fourteenth century, because that is the source from whence we have derived our laws upon the same subject. We propose now to point out briefly the changes which have been made, and the manner in which they have been made, both in England and in this country. We shall here do so briefly, because we have before treated of this

subject, in most of its parts, elaborately, in a Treatise upon Real Estate.

See Bingham on Real Estate.

The objectionable features of the feudal law, so far as estates of inheritance were concerned, and, therefore, so far as the subject is pertinent to the laws of descent, were changed in England in 1290, by the statute before referred to as the statute *quia emptores*.

By that statute it was provided, "that henceforth it shall be lawful to every freeman to sell, at his own pleasure, his lands or tenements, or part thereof, so, nevertheless, that the feoffee shall hold the same lands or tenements of the same chief lord of the fee, and by the same services and customs as his feoffor held them before."

18 Edw. 1, ch. 1.

This secured to the heir freedom from hereditary servitudes and hereditary obligations of every kind and description. His calling and condition in life were no longer predestinated by law, but left to his own determination soon as he reached the years of legal discretion.

The provisions of the statute operated to secure that result in a two-fold manner. The tenant was thus invested with the right to sell and assign his estate at his pleasure. He had neither to procure the assent of the reversioner and landlord, under whom he held, on the one hand, nor that of his heir, who might legally succeed him upon his decease, on the other. In short, he was allowed to quit the status made for him by the feudal law, and select for himself another position in society.

The other provision of the statute, that his assignee should "hold the same lands or tenements of the same chief lord of the fee, and by the same services and customs" as the assignor held them before, tended to secure a like result in a more enduring manner; for it prevented any further imposition of services or other burdens upon the land, which could possibly fall as obligations personally binding on the heir. In

short, this second provision of the statute took from every individual proprietor of lands the right to make any further perpetual grooves, wherein society could be forced to move in gradational circles of subordination and vassalage, each succeeding generation following in the track of the preceding, with tread-mill exactitude.

Whenever the tenant of an estate of inheritance died seised of such estate, the succession thereto was forced on the heir, whoever the heir might be, as fixed by the law. That feature of the feudal system was retained in all its imperious force, and still is retained, as before stated, both in England and in this country. But by reason of the innovations upon the old feudal status, established by the provisions of the statutes, the heir has no longer cause to fear such forced succession. Because he may possibly inherit the estates of his father, he is not thereby possibly born to a state of vassalage and servitude. In England, he holds his inherited estate by a tenure immediately under the crown, and becomes personally liable only to such rents and services as may have been reserved to the crown.

In this country, the freedom of estates of inheritance, from anything like rents and services, has been more perfectly secured than in England; for while here each tenant in fee holds by a tenure immediately of the State, where the lands lie, he holds free from any rents and services even to the State. Obligations of that character cannot be imposed upon estates of inheritance in lands, in any of the States of this country, for in all, the tenure of the lands is proclaimed to be allodial and not feudal. No tenant in fee can be held to service or rent, as the incident of his tenure, either to the State or to an individual, consistently with the American system of land tenures.

See Bingham on Real Estate, 330, *et seq.*

There are some cases reported where a different result has been announced; but instead of being authority as to the law, they are only evidences that the judicial mind has not

always accommodated itself to the theory of allodial tenures. In the cases here generally referred to, it has either lingered six centuries behind, in the lap of very ancient precedents, or become confused and lost in fruitless efforts to distinguish the feudal from the allodial system of tenures, because, evidently, it had no clear ideas of either system.

That class of cases has been sufficiently reviewed in a previous work, and the errors there committed, of both law and logic, sufficiently pointed out.

See Bingham on Real Estate, 111, *et seq.*

Since that work was issued there has been another decision of the New York court of appeals, of the same class, in *Van Rensselaer v. Barringer*, 39 N. Y. 9, the principle of which, if it can be said to have any ruling principle of a legal character, impliedly, if not expressly, concedes the correctness of the criticisms we have before made in the work referred to.

The previous decisions had decided the point, that feudal tenures did not and could not exist in the State; that the reversion of every fee was in the State, and the holder thereof was the tenant of the State; and, as a consequence, that every conveyance of land in fee from one individual to another operated as an assignment, and not as a lease; and left no estate or interest, in other words, no reversion or possibility of reverter in the assignor.

Having so held upon that point, there was no possible way in the law, wherein the plaintiff could be allowed to recover. No one but a feudal lord could enforce rents and services as the condition of holding estates in fee under the feudal, or under any other system of land tenures; and a feudal lord without a lease, and without land or an estate in land, was an impossible condition. The judgment of the court, therefore, that the plaintiff recover, was an absurdity; and so it was virtually pronounced by the same court, in *Van Rensselaer v. Barringer*. In that case it was agreed by the plaintiff, and found by the referee, that the plaintiff had no estate or interest in the premises; and that the defendant was the

tenant in fee holding immediately of the State. Upon that state of facts, the court pronounced it absurd to hold that the plaintiff could recover; that such conclusion was "wholly unwarranted and itself at variance" with the facts found.

The court, however, felt constrained, as it appears in the reported opinion, to sustain the judgment, chiefly on the ground that the plaintiff had always been sustained. The case seems to have turned upon the respect felt to be due to the plaintiff, personally, rather than upon considerations of any principle of law applicable to the facts of the case. Respect for the law is manifested in the resolution to change the facts to accommodate the law. They say, substantially, that it is absurd to hold that a plaintiff, who has no estate in the land, can recover the possession against a defendant who holds as a tenant in fee of the State. So the defendant contended; and might be excused for supposing that, if the court concurred with him in that proposition, the judgment would be reversed. He could have no reason to suppose that he would be met on the part of the court, with the answer that there was an error in the finding of the facts. The facts were precisely as proved and conceded by the plaintiff. They were precisely in accordance with the rulings of the court in other cases. The instrument of conveyance upon which the plaintiff relied being pronounced an assignment in its operation and effect, the facts could not be otherwise. Such being the conceded facts, it was contended by the defendant, that the plaintiff was not entitled to the rights and remedies of a feudal lord, and could not recover possession of the premises for the non-performance of the alleged services and the non-payment of the alleged rent. He was met by the court,—not by the plaintiff,—with the position that the facts must be wrong. And this is shown by reasoning back from the conclusion to the premises. As the conclusion would not legitimately follow from the premises, therefore, the premises must be wrong; and should be so changed, or assumed to be so changed, in the judicial mind, as to authorize the conclusion. The argument of the court is somewhat confusedly expressed,

in the opinion, but it admits of no other possible construction. It may be justly regarded as the first case ever reported, where the court have undertaken to change the facts as found and proved and conceded by the parties, in order either to sustain or reverse a judgment.

But it is not within the range of the subject of this work to any further notice the decision than is necessary to ascertain its bearing as authority upon the question, whether it is possible, under our American system of land tenures, to so fasten rents and services upon estates in fee, that the heirs shall become liable therefor from generation to generation, as soon as they succeed to the estate. That is a grave question, of a very general character, because it embraces in its consequences every foot of land within the boundaries of this great country. It is a grave question in another aspect. The people of this country have expressly provided against such a state of things by their laws and constitutions of government. Are those provisions to be subverted by judicial legislation, and the worst features of feudalism substituted in their place? That question naturally arises from the class of decisions before referred to, which have a tendency in that direction. Confined to the particular cases wherein they were made, those decisions are comparatively of little importance. So considered, they are to be put down to the account of individual wrongs, resulting from judicial errors, which are among the common incidents of human frailty. Considered in the light of principle, affecting the general system of land tenures, they are no longer to be excused on the score of mere human frailties. They then put on the aspect of utter disregard of the established rules of law, and, consequently, of a predetermined and deliberate hostility to our free system of land tenures.

The feudal system, while preserved in its purity, permitted no burdens to descend to the heir except those of a feudal character.

There were no obligations additional to the feudal to fall upon the heir as the consequence of his succession, either

upon him personally, or as a lien upon the estate to which he succeeded. The feudal tenant could not add to the burdens imposed upon the estate by any agreement with a third party. The heir succeeded to the position of the ancestor, and to the obligations incident thereto, precisely as they existed when the ancestor took the estate. No conveyance in the way of mortgage or otherwise, by the ancestor, no judgment against him, no debt contracted by him, and no agreement or contract of his touching the premises, could affect the right thereto of the heir who succeeded, according to the established rules of the feudal law. That class of obligations did not belong to the feudal age, but were, when introduced, an innovation upon it. They were the accessions of the commercial period, and now constitute all the obligations and burdens to which the estate is subject on its coming to the possession of the heir; and those burdens and obligations fall upon the estate and not upon the heir personally.

The distinctive difference between the feudal obligations and those of commercial origin, is, that the former fall upon the heir as personal servitudes, and the latter do not. This distinction has been sometimes overlooked in this country; and that oversight has led the way to some very gross mistakes in the decisions of our courts. The two classes of obligations differ as much, in the rules and principles of their operation, as they differ in their origin and in the conditions of society which respectively gave them origin.

SECTION II

LIABILITY OF THE HEIR UNDER THE COMMERCIAL LAW. THE RIGHTS OF CREDITORS OF THE DECEDENT AS AGAINST THE HEIRS. ORIGIN, GENERAL RULES AND PRINCIPLES.

When the demands of civilization made their encroachments upon feudal institutions, they not only abrogated the feudal customs, but introduced others of a different character in their place. Among those changes were the abrogation of

obligations of a feudal character, which had before descended upon the heir along with the land, and the institution of others of a commercial nature, in their place. These changes were limited to estates in fee.

That class of estates were relieved from demands of rents and services, and other feudal incidents, but subjected to the payment of the debts of the tenant and owner, contracted while he was such tenant and owner, as one of the incidents attending descent to the heir. In other words, they were relieved from obligations of a feudal origin, and subjected to others of a commercial character.

This arrangement at first did not embrace all the debts of the deceased tenant, but only those which he had secured by some acknowledgment of record, or by some instrument in writing under seal. The class of debts secured in that manner were known as debts by specialties; and the heir was bound to satisfy them to the amount of the value of the land which he took by descent from the deceased debtor. 1 Cruise Dig. 67, § 53.

The lands so descended were called, in relation to the debts of the ancestor, assets by descent. At common law, when the heir had aliened the lands before action was brought, or proceedings were taken against him, for the debt of the ancestor, the creditor had no remedy against the heir or against the land.

The rule, in that respect, was changed in England by the statute 3 William and Mary, ch. 14, sec. 5.

It was, by that statute, provided that, in all cases where any heir at law shall be liable to pay the debts of his ancestor, in regard to any lands, tenements or hereditaments descended to him, and shall alien, or make over the same before any action brought or process sued out against him, such heir at law shall be answerable for such debt or debts, in an action or actions for debt, to the value of the said lands so by him sold, aliened or made over; in which case creditors shall be preferred, as in actions against executors or administrators. And such execution shall be taken out upon any judgment

or judgments so obtained against such heir, to the value of the same land, as if the same were his own proper debt or debts; saving that the lands, tenements and hereditaments, *bona fide* aliened before the action brought, shall not be liable to such execution.

The provisions of that statute have been substantially adopted in this country. In New York it is provided that "the heirs of every person who shall have died intestate, and the heirs and devisees of any person who shall have died after the making of his last will and testament, shall respectively be liable for the debts of such person, arising by simple contract or by specialty, to the extent of the estate, interest and right in the real estate which shall have descended to them, from, or been devised to them by such person." 2 R. S. 452, § 33.

In regard to lands aliened by the heir before the commencement of suit against him, it is provided that "he shall be personally liable for the value of the estate aliened; and judgment shall be rendered therefor, and execution awarded, as in suits for his own debts." 2 R. S. 454, § 49. But it is further provided, as in the English statute cited, that the lands so aliened shall not be liable to the execution or in any way affected by the decree against the heir. *Id.* § 51.

But by the statutes of New York it is further provided, that the "heirs shall not be liable for any such debt unless it shall appear that the personal assets of the deceased were not sufficient to pay and discharge the same; or that after due proceedings before the proper surrogate's court, and at law, the creditor has been unable to collect such debt, or some part thereof, from the personal representatives of the deceased, or from his next of kin or legatees."

Where the personal assets are sufficient to pay the debt in part, the heirs are made liable only for the residue. *Id.* 452, 453, § 34.

But the provisions of the two last named sections are subject to be controlled by the will of the ancestor. He may thus charge his real estate with the payment of his debts,

and the heirs will then be liable in the first instance, without requiring the creditor to exhaust his remedies against the personal property of the deceased, or against the next of kin or legatees. *Id.* 453, § 35.

The liability of the heir is protected by a further provision of the statute, that no suit shall be brought against him upon the debts of the testator or intestate within three years from the time of granting letters testamentary or of administration upon the estate of their testator or intestate. 2 R. S. 109, § 53.

Butts v. Genung, 5 Paige, 254.

The statutes of the other States touching this subject appear to be substantially similar.

The creditors of a deceased tenant of an estate of inheritance are provided with three classes of remedies for the collection of their demands. The first is confined to the personal property and the chattel interests of the deceased, which are to be reached through his administrator or executor by proceedings against him. The second is by proceedings to have the real estate, of which the deceased died seised, leased, mortgaged or sold, and the proceeds applied in the payment of the debts; and the third is by an action in certain cases against the heirs.

The first class of remedies is not within the scope designed for this work. The second and third are; the second, because the heir may be thus defeated in his actual succession to the ancestor, in the estate of which the latter died seised; and the last, because the heir, after his succession, may be made liable to the amount of the estate to the creditors of the ancestor. The second and third classes of remedies, therefore, we propose to consider separately and in their order.

SECTION III.

THE REMEDY OF CREDITORS BY SALE OF THE LANDS OF THE DECEDENT. HOW SUCH SALE IS TO BE MADE. GENERAL RULES AND PRINCIPLES WHICH CONTROL. REPORTED DECISIONS EXAMINED.

FIRST. THE POWER OF THE STATES TO LEGISLATE UPON THE SUBJECT.

SECOND. THE RIGHT OF THE HEIR CANNOT BE DIVESTED OR AFFECTED BY PROCEEDINGS TO SELL, TO WHICH HE IS NOT MADE A PARTY.

THIRD. NEITHER THE CREDITOR OF THE DECEDENT, NOR HIS ADMINISTRATOR, HAS ANY TITLE TO THE ESTATE, BUT THE TITLE IS IN THE HEIR.

FOURTH. THE DEBTS OF THE ANCESTOR, AND THE RIGHT OF THE HEIR TO CONTEST THEM.

This remedy of the creditor is one which depends entirely upon the statutory provisions of the several States.

In New York executors or administrators may apply to the surrogate for authority to mortgage, lease or sell so much of the real estate of their testator or intestate as shall be necessary to pay such debts as remain unpaid, or are likely to remain unpaid after his personal property is exhausted. 2 R. S. 99, § 1.

The provision is such, that before they have a right to make such application, they shall have made and filed an inventory, and shall have ascertained that the personal estate of the decedent is insufficient to pay his debts.

By another section, the foregoing provision is extended and made to embrace the right and interest which the decedent may have held under an executory contract of purchase.

The application of the executor or administrator to the surrogate must be made by petition, which is required to show the necessary facts to authorize a sale; that is, it must state the amount of the personal property which has come to the hands of the executor or administrator, the application which has been made of it, the debts outstanding against the decedent, so far as they can be ascertained, a description of all the real estate of which the decedent died seised, with the

value of each lot, whether occupied or unoccupied, and if occupied the name of the occupant, the names and ages of the devisees, if any, and of the heirs of the deceased; and the petition must be verified by the oath of the person presenting it. 2 R. S. 99, § 2.

The mode of proceeding is particularly prescribed by the statute in all its steps. Similar provisions exist in the statutes of other States, differing in some of their details. The power to give the authority is generally vested in such courts as are particularly provided to have exclusive original jurisdiction over the estates of deceased parties. The time of the application is limited in all the States, varying from one to three years.

The details of practice differ in the different States in some respects; but there are certain general principles which are common to all. It is not consistent with the design of this work to go farther than to treat of those general principles. Matters of mere practice can be best ascertained by a reference to the statutes of the States respectively.

FIRST. THE POWER OF THE STATE TO LEGISLATE UPON THE SUBJECT.

It will be readily seen by any one, who has knowledge of the feudal law, that selling the right or interest held by a tenant in his life time, after his decease, to pay debts which he owed at his death, was wholly inadmissible. The feudal tenant stood between his lord on the one hand, and his heirs on the other, with no right to sell, or incumber, or divert the estate from his heirs. His right was usufructuary merely, and did not survive him. To allow his creditors, after his decease, to sell the estate, would have broken in upon the arrangements and rights of the feudal lord on the one side, and would have deprived the heirs of their rights on the other. Of course, under the feudal law, no sale of what a decedent may have owned in his life-time could have been affected by his creditors after his decease.

It was natural, therefore, that the question should arise, when such proceeding was first instituted under our statutes, whether the legislature had the constitutional power to authorize such sale. In one view of the question, it was a compulsory sale of one man's property to pay another's debts; and, of course, not allowable. That was purely the feudal view of the question. The feudal tenant took the estate with the burdens imposed thereon by the feudal lord in the lease which created the estate. His heir succeeded him with the same burdens, but with no additional ones. His right was as independent of his ancestor as though his ancestor had never preceded him in the estate. The commercial revolution in land tenures, presented a different view of the relative rights of the ancestor and the heir. But still there was enough left of the feudal features to suggest the question, whether the heir's rights were not so vested and absolute, as to forbid any sale or other disposition of the estate to pay or secure the ancestor's debts, after the death of the ancestor.

The rights of a creditor to resort to the lands of his debtor, after the decease of the latter, in order to make the amount of his debt, were the chief subject of the decision of the supreme court of the United States, in the case of *Watkins v. Holman*, 16 Peters, 25. The case arose in Alabama. The action was ejectment, to recover possession of a lot of land in the city of Mobile, brought by the heirs of Holman.

The plaintiffs claimed to prove title as follows: It appeared that one Geronio was in possession of the lot before 1785, and so continued until his death; that he left a will, devising the lot to Lucy Landrey; that her father took charge of it for her, until she became of age, when she went into occupation; that she conveyed by deed, in 1818, to McKinsie and Swett, who conveyed to Oliver Holman on the same day; that Holman continued in occupation of the premises until his death, in 1822; and that the plaintiffs claimed title thereto, as heirs at law of Holman.

On the other side, the defendants claimed to make title under a sale and conveyance made by Sarah Holman, as

administratrix of the said Oliver Holman, in 1824. It appeared that there was a special act of the legislature of Alabama, authorizing her to sell and to convey the said lands for the payment of the debts of the intestate; and that sale and conveyance were made accordingly. It was one of the leading points of conflict before the court, that the act of the legislature was unconstitutional, and the sale thereunder invalid; that the heirs at law could not be thus deprived of their title.

The court, in the reported opinion, took a very broad and comprehensive view of the whole subject; and particularly discussed the comparative rights of heirs and creditors, both as established on authority, in this country, and as founded upon principle; holding, as their conclusion, that the act of the legislature was constitutional, and the sale and conveyance thereunder valid.

As to the rights of heirs, regarded in the light of principle, it is said:

“But, on principle, this proceeding is sustainable. On the death of the ancestor, the land owned by him descends to his heirs. But how do they hold it? They hold it subject to the payment of the debts of the ancestor, in those States where it is liable to such debts.

“The heirs cannot alien the land to the prejudice of creditors. In fact and in law they have no right to the real estate of their ancestor, except that of possession, until the creditors shall be paid.

“As it regards the question of power in the legislature, no objection is perceived to their subjecting the lands of the deceased to the payment of his debts, to the exclusion of his personal property. The legislature regulates descents, and the conveyance of real estate. To define the rights of debtor and creditor is their common duty. The whole range of remedies lies within their province. They may authorize a guardian to convey the lands of an infant; and, indeed, they may give the capacity to the infant himself to convey them. The idea that the lands of an infant which descend to him,

cannot be made responsible for the payment of the debts of the ancestor, except through the decree of a court of chancery, is novel and unfounded. So far from this being the case, no doubt is entertained that the legislature of a State have power to subject the lands of a deceased person to execution in the same manner as if he were living. The mode in which this shall be done is a question of policy, and rests in the discretion of the legislature."

They quote from a report in the senate of Alabama, as follows: "Upon the death of the ancestor, the real estate owned by him descends to and vests in his heirs, and the title thus vested cannot be divested without some proceeding to which the heir is a party. A minor could not legally assent to the passage of a law authorizing the sale of his real estate, but would have the right to affirm or disaffirm the sale when he arrived at lawful age;" and they say of it, "as a legal proposition it is wholly unsustainable."

The authorities relied upon do not consist of adjudicated decisions, but are made up entirely of the general practice as it was said to prevail in the different States; that vast amounts of real property in Ohio and other States rested for a title upon sales of executors and administrators under the order of a court, without making the heirs parties, and that the validity of titles so acquired did not seem ever to have been questioned.

Their condemnation of the propositions quoted from the senate report of Alabama cannot be sustained in full. It will be shown, before we leave the subject, that it has since been repeatedly decided, that the estate held by the ancestor so descends to and "vests in his heirs," that their title cannot be divested "without some proceeding to which they are parties." We have not so far innovated, in this country, upon the feudal feature of descents, as to deny that the estate descends to and vests in the heir immediately upon the decease of the ancestor, intestate; and that he then comes to such rights of property as bring him within the protection of the Constitution, so that he cannot be deprived

thereof without due process of law. The extent to which the changes of the laws have gone in that direction, does not go beyond giving the creditors of the ancestor precedence over his heirs to the amount of their demands; and the heirs must have the opportunity to contest those demands.

The decision of *Watkins v. Holman* seems to have been the only reported case wherein the question of constitutional right on the part of the State to authorize the sale of a decedent's real estate to pay his debts, has been passed upon, and to have been accepted as conclusive authority upon that point. It may be regarded as having settled that question, in this country, forever.

SECOND. THE RIGHT OF THE HEIR CANNOT BE DIVESTED OR AFFECTED BY PROCEEDINGS TO SELL, TO WHICH HE IS NOT MADE A PARTY.

When the ancestor dies intestate, the estate at once vests in the heir. This seems to be generally conceded; and it will be difficult to show any reasonable grounds for a contrary opinion. That point is not affected by making the estate liable to the debts of the ancestor, only so far as it may concern the value of the estate to the heir. His right of property remains the same; and, it will be found settled by abundant authority, that he cannot be deprived of his right, in any degree, by proceedings of which he has no notice and no opportunity to contest.

In *Forbes v. Halsey*, 26 N. Y. 64, the court seem to have been unanimous in pronouncing that a judgment of the supreme court, to which the heirs at law were not parties, was not admissible in evidence to affect the rights of such heirs. The action was ejectment between the heirs at law on the one side, and parties claiming title on the other side, through a sale of the premises to pay the debts of the decedent.

The same doctrine was sanctioned in *Bloom v. Burdick*, 1 Hill, 139; which was an action of ejectment also, between heirs at law and purchasers under creditors' sale. The heirs

at law had not been made parties to the proceedings before the surrogate, which resulted in the order of sale; and the question was, whether they were concluded by that order. It was held that they were not, even as a general rule, independently of the provisions of the statute which gave the surrogate jurisdiction. It is said:

"It is a cardinal principle in the administration of justice that no man can be condemned or divested of his right until he has had the opportunity of being heard. He must, either by serving process, publishing notice, appointing a guardian, or in some other way, be brought into court; and if judgment is rendered against him before that is done, the proceeding will be as utterly void as though the court had undertaken to act where the subject matter was not within its cognizance."

The same doctrine was applied by the court of appeals of New York, in *Schneider v. McFarland*, 2 N. Y. 459. The contest in that case also, was between heirs at law and purchasers at a sale under proceedings by creditors, in an action of ejectment. When the proceedings in the surrogate's court were had, the plaintiffs were infants, and were not so represented as to constitute them parties: and the question was, whether they were concluded by the sale under those proceedings, so as to be estopped from asserting their rights. It was held that the proceedings and the sale thereunder were void as to the infant heirs.

The case was made to turn chiefly upon the provisions of the statute which give a surrogate's court jurisdiction to act in such cases; but the rights of heirs and the general principle that they cannot be affected by proceedings wherein they have had no opportunity to be heard, are the foundation upon which the decision rests.

The court reviewed some of the decisions of other States, which were claimed to so far deny rights to heirs as to render it unnecessary to make them parties to proceedings for the sale of the lands of the decedent, and questioned whether that was the true ground upon which that class of decisions

rested. They did not accept those cases as authority that an heir at law could have no rights to the lands of the decedent, as against creditors, which the courts were bound to respect; but found the true grounds of those decisions to be contained in the statutes which made the administrator, while instituting and conducting such proceedings, the representative, not of the creditors alone, but of the heirs at law also.

In *Havens v. Sherman*, 42 Barb. 636, the sale of real estate on application of an administrator, who was at the time the general guardian of infant heirs, was held void as to those heirs, because they were in no way made parties to the proceedings.

It was contended, that, as the administrator was also the general guardian, the infant heirs were made parties. But the court held, that as soon as the administrator instituted proceedings to sell the land, he "became antagonistic to the infant," notwithstanding he was their general guardian. They denied the propriety of holding that conflicting interests could be represented by the same person acting in two different representative capacities.

So in *Ackley v. Dygert*, 33 Barb. 176, the court adhered to the maxim, which is recognized wherever the common law prevails, that no person can be divested of his property by being ignored, and that he has a right "to a day in court" before the court can rightfully attempt that power.

In *Sherry v. Denn*, 8 Blackf. 542, a sale by the administrator, under proceedings of the probate court, was held not to divest the title of the heirs, because the heirs were not parties to the proceedings. That point seems to have been admitted by the parties.

The courts in Ohio do not hold a different rule, as seems to be sometimes assumed. In *Snevely v. Lowe*, 18 Ohio, 368, this point was very thoroughly examined, and the previous cases considered. It was not held that proceedings authorizing a sale of lands by an administrator were valid as against heirs, who were not parties. The point was that the record showed

service only upon three of four children, while no service appeared to have been made upon the fourth. But the record did show the appointment of a guardian *ad litem* for the children, who were infants, and his appearance for all of them; and the court held that it thus appeared sufficiently that all the children were parties to the proceedings; and they cite and comment upon two other cases holding the same point.

And in *Benson v. Cilley*, 8 Ohio State R. 604, the same question came up for review under the provisions of a statute passed in 1824, which required, by its very terms, that heirs should be made parties to such proceedings by having notice served upon them.

The court, in that case, seem to have construed the statute of 1824 as merely declaratory of the law as it before existed, and not as introducing a new rule; and that notice or process served on a guardian *ad litem*, was a sufficient notice to the infant heirs, afterwards, as before.

See also *Irwin v. Jeffers*, 3 Ohio State R. 389; *Sheldon v. Newton*, 3 id. 494; *Sprague v. Letherbury*, 4 McLean, 451.

In Wisconsin an administrator's sale, under a license from the probate court, cannot be sustained in a collateral proceeding, where the record fails to show that the heirs at law were notified, as required by statute, of the application for such license.

Gibbs v. Shaw, 17 Wis. 197.

In Mississippi, where the record stated that proof of the publication and notice to heirs was made according to law, it was held to be *prima facie* evidence of due legal service of notice.

Monk v. Home, 88 Miss. 100.

But it was conceded that the heirs could not be bound by such proceedings, unless it appeared that they were parties thereto.

The same doctrine was held in Indiana, in *Guy v. Pierson*, 21 Ind. 18. In an application by an administrator for an

order to sell real estate, if the record fails to show that the heirs were not otherwise notified of the proceedings, than appeared from the appointment of a guardian *ad litem* for them, and the citing him to show cause why the property should not be sold, the court has no jurisdiction, and the proceedings, as to the heirs, will be void. It was also held that the names of the heirs must appear where the names were known. It was remarked that, "for the reason that the plaintiff was not a party to the proceeding in the probate court, he is not bound by that proceeding, and his title to his share of his father's estate has not passed from him."

To the same effect was the ruling in *Martin v. Starr*, 7 Ind. 224.

The same doctrine was held in *Craig v. McGehee*, 16 Ala. 41.

In Illinois it is held that the heirs need not be named in the petition, because the statute does not so require; and that publication of notice, as prescribed by statute, is sufficient to give the court jurisdiction of the parties. *Stow v. Kimball*, 28 Ill. 93.

But in *Wheatley v. Harvey*, 1 Swan (Tenn.), 484, it is held that an infant heir can be made a party only by the service of process upon him; and the appearance by guardian is not sufficient.

So also in *Whitmore v. Johnson's heirs*, 10 Humph. 610, a decree of the circuit court assuming to authorize and direct the administrator to sell lands of the intestate, was pronounced void for want of jurisdiction, in that, among other omissions named, it did not appear that the heirs were made parties to the proceedings.

The necessity of making the heirs parties to the proceedings of sale was conceded in *Gerrard v. Johnson*, 12 Ind. 636. It appeared from the record that there was no service of papers on the heirs, but the court held that it was to be presumed that they appeared voluntarily, as the record did not show the contrary.

This case goes a good way in its presumptions of appearance of the parties, but it is, nevertheless, no authority that

the rights of the heir can be affected by proceedings to which he was not made a party.

Where it appeared by a recital in the probate decree, "that all parties interested therein have been duly notified," it was held *prima facie evidence*, in a collateral proceeding, that the proper notice had been given to confer jurisdiction over the matter and the parties.

Little v. Sinnett, 7 Clarke (Iowa), 324.

It has been held in Pennsylvania, in *Wall's appeal*, 31 Penn. St. R. 62, that, under their act of March 29, 1832, it was not necessary that personal notice should be given to heirs, even if they were minors, of proceedings by the administrator to sell real estate for the payment of the debts of the decedent; that public notice of time and place of sale was notice sufficient to make the proceedings valid.

And in Mississippi it was decided, that publication of notice of the application of an administrator to sell land, when made for the period of time required by law, is sufficient notice to a non-resident heir.

Sellers v. Talby, 33 Miss. 582.

But, in another case, it was held essential to a sale of land by an administrator upon a decree of the probate court, that the record should show that citations were properly issued and served. *Kempe v. Pintard*, 32 Miss. 324.

Cases of this class seem sometimes to have been mistaken as authority for the proposition, that heirs had no vested rights in the estate of the ancestor, as against his creditors, which required them to be made parties to proceedings of sale of the estate for the payment of his debts. A careful examination of those cases, however, will be convincing that no such proposition was intended to be announced as law, or necessarily resulted from what was decided. That class of cases has turned upon the point, as to what was a sufficient notice to heirs to make them parties to the proceedings; and not upon the point, that no notice at all was required. It

will not be denied, that the publication of a notice, or the leaving a copy of process in some specified place, may be constituted by legislation, proper service of papers to make an interested person a party to proceedings which shall affect his rights of property.

That mode of acquiring jurisdiction, both of the subject matter and of the persons, is not uncommon. In *Gilman v. Thompson*, 11 Verm. 643, it was held, that the court obtained jurisdiction of the defendant, by an attachment of certain lands as the property of the defendant, and leaving a copy in the town clerk's office. It is said, "This gave the court jurisdiction."

It would be absurd to consider that case as authority that the defendant had no vested estate in the land.

The courts of Pennsylvania have, in some cases, perhaps, departed the most, in the expression of opinions, from the feudal idea of the immediate succession of the heir to the estate of the ancestor. But they have based their expressed views chiefly upon certain peculiarities, which they claim to exist in the statutes of that State.

In *Horner v. Hasbrouck*, 41 Penn. St. R. 169, it was held that the lands of a decedent, like his personal property, were assets for the payment of debts, and that the heirs succeeded only to such part of the estate as remained after payment of the debts.

In that case, the sale under an execution against the heir, was held to be superseded by a subsequent sale for the payment of the debts of the intestate.

The opinion, in that case, opens with a summary of the origin and early history of administrators in England; and, in conclusion, it is remarked: "But real estate was never treated in England as assets for payment of debts, and was not subject to administration."

It then gives a history of that department of the law in Pennsylvania, and of the origin and progressive development of the "orphan's court," an institution in some respects peculiar to that State.

It is remarked: "When a man dies in Pennsylvania, his estate, real and personal, comes within the jurisdiction of the orphan's court, to be administered, first of all, for the benefit of creditors, and next for legatees, devisees and heirs."

The peculiarities seem, however, to be more in form and name than in substance. The personal property is held to be the primary fund for the payment of debts, and the real estate can be so appropriated only on failure of the personal property to cover the whole amount.

It is said: "The personal estate is, indeed, the primary fund for payment of debts, but the real estate is as truly assets for this purpose as the personalty, though not to be first appropriated, and both realty and personalty are committed to the jurisdiction of the orphan's court. Heirs are thus postponed to creditors, and must wait a year for administration. If it be said, as for some purposes it is correct to say, that the estate vests in the heir directly the ancestor dies, it must be understood to be a contingent interest, defeasible in behalf of creditors. What really vests in the heir is a title to the *residuum*, or, in the language of our act of 1834, the 'surplusage' of the estate. This is what the law casts on the heir. It can be nothing else consistently with our system of administration and distribution."

When we bear in mind that the only point decided in that case was, that a sale for the payment of the debts of the ancestor was allowed to supersede a sale previously made under execution against the heir, the peculiarities alleged to exist disappear; for such result would be allowed in all the States.

The peculiarities spoken of in the opinion seem to exist more in the mode of criticism adopted by the court, than in the laws themselves. The only ground for saying that the estate does not vest in the heir "directly the ancestor dies" is, that the creditors of the ancestor are to have preference over the heir, to the extent of their dues. But such is the case in every State; and so is the case of judgment creditors in all circumstances. Was it ever claimed that the title to

the estate was in the judgment creditor? that it passed from the judgment debtor to the judgment creditor directly the judgment was rendered?

It is obvious that the criticisms of the court referred to, however appropriate they might have been in a mere pecuniary or commercial sense, were entirely inapplicable to represent the legal rights of parties; and they were mischievous in their tendencies, because they were calculated to beget the impression that the heir has no rights which entitle him to be heard as against the creditor. If the heir takes title only to the residuum, after debts are paid, then he has no claim to be made party to the proceedings by creditors to effect a sale. His title would then have no inception until after the sale, and would attach only to what was left after the ancestor's debts were paid.

THIRD. NEITHER THE CREDITOR OF THE DECEDENT, NOR HIS ADMINISTRATOR HAS ANY TITLE TO THE ESTATE; BUT THE TITLE IS IN THE HEIRS.

It has been decided directly and expressly in California, that the administrator has no title or estate in the land, and can make no binding contract for its sale. He can only ask the court for an order of sale.

Stuart v. Allen, 16 Cal. 473; 10 Barb. 432.

And in the case of *The Heirs of Ludlow v. Wade*, 5 Ohio, 494, it was held, that the administrator acquired the power to sell the lands of the intestate from the statute, which authorized the order of the court to that effect; and that a repeal of the statute before the sale, although after the order, would prevent any valid sale. In assigning reasons for the decision, it is said: "Without the order, it is true, the administrator cannot sell. But the power itself is derived from a higher source, from the legislature itself. By his appointment, the administrator is vested with an interest in the personalty, but he has no concern with the realty. At common law, an administrator has no right to interfere with the latter."

"The statute, however, authorizes him to do it under certain circumstances. But it does not leave it in his discretion to determine whether those circumstances do or do not exist. This is to be determined by the probate court upon an examination of the facts. And it is only with the approbation of the court that this power intrusted to him, not by the order of the court, but by the law under which he acts, can be exercised." The legislature "authorize the administrator to sell, but do not leave it to his discretion when a sale should take place. It can only be done when a certain state of facts exists; and when such is the case, it may be done, provided the court advise or direct. In this view of the case, I can look upon the order of sale as nothing more than record evidence of the existence of the necessary state of facts to justify such a proceeding, and the assent on the part of the court that the administrator should exercise a power previously vested in him. It calls that power which was before dormant into life and activity. It follows, then, that a repeal of the law is a revocation of the power. And after its revocation a sale made would be void, although during the existence of the statute an order for such sale had been made."

In Connecticut it is held that the authority to an administrator to sell the land of his intestate is a personal trust, and must be strictly pursued.

Lockwood v. Sturdevant, 6 Conn. 886.

If there are no debts of the intestate calling for a sale of the real estate for the purpose of paying them, an administrator cannot sustain a petition for authority to sell real estate.

Lawson v. Schutt, 4 Allen, 359.

In the case last cited, it was decided that the debts upon which the petition to sell was founded, were barred by the statute of limitations; and being so barred, that they afforded no foundation upon which to sustain the application. The court said, as to the position of the administrator: "But his right to sell depends wholly upon the liability of the estate

to be taken and appropriated to the payment of debts which can be enforced by an action at law."

It has been held in Texas that an order to sell land to pay debts is exhausted, when enough has been raised to pay the debts; and that any further sales under the order are void.

Wells v. Mills, 23 Texas, 302.

It was said in that case: "The order of the court empowered the administrator to sell a sufficiency of the property to raise the sum of four thousand dollars. This he had done before he proceeded to make the sale here in question. His power was then exhausted, and he was without authority to make the sale."

The authorities generally concur in holding, that the administrator has no interest in the land or real property of his intestate; and no power to sell, except what he acquires, under the direction of the court, from the express provisions of the statute. He has no title or interest in the land which he sells under order of the court, more than has the sheriff of a county in the lands of the judgment debtor which he sells under execution. So far as title or interest in the land is concerned, they are on a like footing. Each is the mere agent or officer of the law, required and authorized to sell the rights which others have in lands for the purpose of paying debts.

The authority to sell is merely statutory, and must be strictly pursued or the sale is void.

Corwin v. Merritt, 3 Barb. 841; *Jackson v. Robinson*, 4 Wend. 436.

It is equally well settled by the authorities, and equally clear in principle, that the creditor of the decedent has no estate in, or title to the lands of which the latter may have died seised.

The debts due from the ancestor are not even a lien, in the strict meaning of that word, upon the lands he may leave. They are only liable to be made a lien by the concurrence of certain facts and circumstances, to be shown as before mentioned, and found to be true by the proper tribunal to

which jurisdiction of such matters is committed. There is no lien until the decree or order of sale, and until the sale shall be made. In short, the debt is never a lien at all. In other words, the simple contract creditor has not, like the judgment creditor, a subsisting, vested interest in the land of which he cannot be divested, except by due process of law. The legislative provision which authorizes the sale of the decedent's lands to pay his debts, does not vest any right of property in the creditor. It is regarded as merely giving a remedy, and not as the vesting of a right. Consequently, the legislature can, at any time, revoke the remedy, by repealing the statute which gives it, or otherwise; and if done at any time or at any stage of the proceedings, before the sale, the creditor is without redress.

This was so held in the case of *Campan v. Gillett*, 1 Mann. (Mich.) 416. In that case, license had been granted to the administratrix to sell certain real estate to pay the debts of her intestate. After the order or decree of sale was made, but before the sale, the statute which gave the court authority to make the decree or order, was repealed. The repeal of the law was held to operate as a revocation of the order or license to sell.

And in Ohio, in *Perry v. Clarkson*, 16 Ohio, 571, the sale of land made by an administrator, pursuant to an order entered under the statute of 1795, was declared void, because before the sale was made the statute was repealed.

In North Carolina, in *Thompson v. Cox*, 8 Jones' L. R. 311, it was held that the statute of that State, which required that "the heirs and devisees, or *other persons interested* in said estate, shall be made parties to the petition of the executor or administrator to sell real estate," did not embrace creditors; but that the words "or other persons interested," were intended to embrace the assignees of an heir or devisee. It was there said by the court that "creditors have no direct interest in the estate, and can only reach it by charging the executor or administrator with the proceeds of the sale as assets."

That case arose upon the petition of creditors to set aside a sale of the lands of the intestate, made by the administrator to pay debts, on the ground that the creditors were not made parties to the proceedings. The petition was denied for the reason that the creditors had no interest in the land.

In *Gill v. Given*, 4 Met. (Ky.) 197, a sale was pronounced void, where it appeared upon the record that a sale of the whole tract was not necessary to pay the decedent's debts. The point was, that the court had jurisdiction to order a sale of only so much as was necessary to pay the debts.

In *Wilson v. Wilson*, 13 Barb. 264, it was held that unpaid debts of the decedent are no lien upon the land for any substantial purpose, either in law or equity, until made so by proper proceedings.

In this case the father, under the belief that he took the lands as the heir at law of a deceased son, paid some debts due from the son. The widow of the son was afterwards delivered of a son, posthumous issue of the deceased son, who became the heir. The father died, and his executors brought this action for an account, and to restrain the prosecution of an action at law for use and occupation. It was held that the executors could not maintain the action.

In *Jewett v. Keenholts*, 16 Barb. 193, it was said that while the debtor lives the debt is not a lien on his lands. But at the moment of his death, it becomes at once a lien upon the land, so that the heir or devisee takes, chargeable with the payment of the debts of the ancestor.

The latter part of the proposition there stated is only qualifiedly true. If the debt became a lien on the land, in the strict sense of the term *lien*, a repeal of the statute could not release the land from it. It is unquestionably true, that before the death of the ancestor the debts are, in no sense of the word, a lien on his lands. Upon his death, the statute gives the creditor, after the personal property is exhausted, a two-fold remedy against the heir. It gives him the right to require a sale of the premises of the decedent, or a remedy by action directly against the heir. As before remarked,

died in 1861. His wife petitioned to have the after-acquired real estate sold to pay the debts, so as to exonerate the personal property therefrom. The heirs contested, and her petition was denied.

The ground assigned was, that the law required the personal property to be first exhausted ; and that the will did not express a different intention.

FOURTH. THE DEBTS OF THE ANCESTOR, AND THE RIGHT OF THE HEIR TO CONTEST THEM.

When proceedings for the leasing, mortgaging or selling lands are instituted, the parties who are interested in the land have a right to contest the claims of the creditors. To give them the opportunity to contest the claims, is the purpose for which they are to be made parties. The right of defense is open to the heirs to the same extent as it would be to the ancestor, if alive.

The demands must be such as were due from the ancestor, or those which were incurred by him in his lifetime. No other claims will authorize an order of sale. A sale of the real estate of an intestate by the administrator, made by the order and under the direction of the probate court, to defray the expense and costs of administration, was held illegal and void in Missouri.

Farrar v. Dean, 24 Mo. 16 ; see also *Fitch v. Witbeck*, 2 Barb. Ch. R. 161.

Judgment of the court, determining the indebtedness of the ancestor, had after his decease, is open to be questioned in proceedings against heirs, when the heirs were not parties to the proceedings wherein the judgment was had.

Platter v. Anderson, 5 Ind. 83.

An action of ejectment by the heir, to recover the possession of lands descended, is not barred by a petition and proceedings thereon by an administrator for a license to sell the premises for the payment of debts.

Chadbourne v. Rockliffe, 30 Maine, 354.

In *Sandford v. Granger*, 12 Barb. 403, it was held, that so much of a judgment in an action against administrators, for a debt due from the intestate, as was for costs awarded against the administrators, could not be charged on real estate in the hands of the heir. This decision was put upon the authority of *Wood v. Byington*, 2 Barb. Ch. R. 387; and it was there founded entirely upon the construction given to the statute provision upon that point.

In view of all the authorities upon the subject, it is undoubtedly the rule, that the estate of the ancestor who has died intestate, is vested in his heirs, immediately upon his decease: and that his creditors have no estate therein, or lien thereupon, until sale has been made and perfected by his administrator, or executor, by proceedings taken strictly according to the directions prescribed by statute.

SECTION IV.

WHEN CREDITORS OF THE DECEDENT MAY SUE THE HEIRS. WHAT MUST BE SHOWN TO SUSTAIN SUCH ACTION. GENERAL RULES AND PRINCIPLES COMMON TO ALL THE STATES. AUTHORITIES EXAMINED.

FIRST. THE CHARACTER OF THE DEBTS OF THE DECEDENT THAT MAY BE ENFORCED OF THE HEIR.

SECOND. THE PARTIES DEFENDANT AND THEIR RIGHTS OF DEFENSE.

It should be borne in mind, while upon the subject of this, as well as the preceding section, that the creditors of the ancestor were furnished with no remedies by the feudal law for the enforcement of their debts against the heir. That system of laws recognized no rights upon which that class of remedies could be made to rest. Its policy was hostile to such demands, because it would render the tenant less able to perform his feudal services and pay his rents. The two classes of obligations could not live together. The land must be all feudal or all free.

Chancellor Kent, in his Commentaries, remarks of the feudal law, touching this subject, as follows: "By the hard

and unjust rule of the common law, land descended, or devised, was not liable to simple contract debts of the ancestor or testator." 4 Kent, 419, 420.

The learned commentator evidently looked at the question from the modern, and not from the ancient standpoint. The moral standard of the feudal period could not have consistently favored the class of remedies which are the subject of this section. It would have been hard upon the heir to exact and force from him the rents and services imposed by the feudal law, on his succeeding to the ancestor's estate, or tenancy, and at the same time force him to pay the debts of the ancestor, to the amount of the full value of the lands descended to him. He would not have had the means to meet both classes of demands. The heir, upon succeeding to the tenancy, was compelled to render to the feudal lord, in rents and services, its full annual value. There was nothing left to pay the ancestor's debts.

This liability to debts was an encroachment upon the rights of the feudal lord and the rights of his tenant, as those rights were established under the feudal law. It was a system of liabilities which grew up in opposition to the feudal system, and has reached its present condition by slow stages, with considerable intervals between.

The rules of the past periods which are now changed, are important, chiefly to instruct as to what extent the decisions and authorities of the different eras are applicable to explain and ascertain the rights and obligations of parties under existing laws, and will be briefly considered for that purpose.

**FIRST. THE CHARACTER OF THE DEBTS OF THE DECEDENT THAT
MAY BE ENFORCED OF THE HEIR.**

In the early stages of this branch of the law in England, the liability of the heir seems to have been limited, not merely to debts evidenced by matter of record, or by deed, but to debts which by the language of the agreement embraced the heirs as parties bound to pay. The obligation

was required to be one which purported to agree to pay, not only for the contracting party, but for his heirs.

Co. Litt. 209 a; Bac. Abr. Tit. Heir and Ancestor, F.; Co. Litt. 876 b; Buckley v. Nightengale, 1 Strange, 665; Williams on Real Prop. 68; 2 Bl. Com. 244; Plow. 457; 4 Kent, 419, 420.

The notion that to bind the heir, the ancestor must contract that the heir should be bound, was not unnatural to the rude ideas of the feudal age. It was not necessary to the feudal contract to name the heir, only for the purpose of indicating the intention of the parties to extend the contract of lease to the heirs. The obligation to service and rents on the part of the heir, did not depend on any express contract that he should be liable. Originally, and in pure feuds, there was no express provision to perform services, or pay rents. The feudal law supplied that part of the contract by certain established rules. When it became the custom to specify the services and rents in the contract of lease, it was so far a departure from the feudal customs as to be placed under the denomination of an impure or improper feud. The obligations upon the heir never gained force from any expressed intention of the ancestor to bind him. The intention of the party making a contract, it is true, is the controlling principle, when confined to such limits as he has a right to contract for. But the expressed intention of one person to obligate another, is of no moment to fix the obligation upon that other. The heir could not be bound to pay the debts of the ancestor merely because the ancestor might have covenanted that he should pay them. Such a rule would enable every generation to borrow from posterity to an unlimited extent, and would lead to endless absurdities.

The idea, therefore, that the heir should be bound to pay only such specialty debts of the ancestor, as provided in express terms that the heir should pay, was soon abandoned.

Nor was there any sound reason why specialty debts should be preferred to simple contract debts in that respect. The one was no more a lien upon the land, while the debtor

lived, than the other. And, as the rule was first established, even the specialty creditor lost all chance to resort to the land, by an alienation of the land by the debtor during life, or by a testamentary alienation.

Plunket v Pension, 2 Atk. 204; *Davy v. Pepys*, Plowden, 439.

The distinction was not long continued. Simple contract debts were soon placed on the same footing with specialty debts, in respect to the heirs. The manner in which the change was brought about seems to be this: It occasionally happened that debtors, through their own appreciation of justice, devised or conveyed by deed their lands to trustees to sell, and from the proceeds, to pay their debts; or, by their wills, they charged their lands with the payment of their debts generally, making no distinction in favor of specialties.

The distribution of the proceeds of estates so disposed of, devolved on the court of chancery; and that court adopted the rule of allowing creditors by simple contracts, to share equally with the creditors by specialties. This practice was extended and made to embrace the liabilities of heirs.

Parker v. Dee, 2 Chan. Cases, 201; *Bailey v. Ekins*, 7 Ves. 819; 2 Jarm. on Wills, 544; *Williams on Contracts*, 64; *Silk v. Prine*, 2 Leading Cases in Eq. 252.

This change in favor of simple contracts was not made immediately, however, after the practice here referred to in the court of chancery; and, when first introduced, was limited in its extent. By the statute, 47 Geo. III, ch. 74, the fee simple estates of deceased traders were made liable to their simple contract debts, equally with their specialties. That was in 1807; but it was not until 1833 that the provisions of that statute were made applicable to all debtors alike, and then only in a qualified manner. See 3 and 4 William IV, ch. 104.

See also *Richardson v. Horton*, 7 Beavan, 112; 2 Sug. on Vendors, 298; *Spackman v. Trimbell*, 8 Simons, 259.

A distinction was made in England in regard to judgment creditors. This distinction was confined to such judgments

as had been obtained against the debtor in his life-time. By the statute, Edw. I, ch. 18, the judgment creditor was allowed to take and hold the one-half of the debtor's land along with his chattels, until the debt was made. Beasts of the plough were excepted from the operation of the statute.

The creditor had that right to the land, even after it had passed to a purchaser, and after the decease of the judgment debtor.

See *Stileman v. Ashdown*, 2 Atk. 608.

But such judgment creditors were not entitled to a personal action against the heir, except by *scire facias* to have execution of the lands.

Sir Wm. Herbert's case, 3 Coke R. 12a; *Davy v. Pepys*, Plow. 441; *Williams on Real Prop.* 67, note 1.

The judgment creditors, therefore, were not so highly privileged, in that respect, as against the heir, as the mere contract creditors. The latter could recover by action against the heir the full amount of all the lands descended, while the former could reach only such lands as were embraced by the lien of their judgments; and of them, could appropriate only one-half to their debts.

The legislation of this country is more favorable to creditors than the legislation of England, in subjecting the lands of the decedent to the payment of his debts. The general rule seems to have been adopted here, that the lands of which the debtor shall have died seised of an estate of inheritance, shall be liable to the payment of his debts, whether such debts are specialties or simple contract debts; and, for that purpose, that they shall be regarded as assets in the hands of the heir, which may be so appropriated and applied, either by the sale of the premises on the application of the administrator, or executor, or by an action against the heir in the manner provided by statute.

4 Kent Com. 420; *Watkins v. Holman*, 16 Peters, 25; *Bellas v. McCarty*, 10 Watts, 31; *Morris' Lessee v. Smith*, 1 Yates, 244.

Yet, as before shown, the debts of the ancestor, whether due by special or simple contract, are not a lien on the debtor's land during his life, unless they have been made matter of judgment record, or secured by mortgage on the premises. They can be made a lien upon the land during his life only by a judgment, unless he chooses to make them so. While he lives, his lands can be reached and appropriated to the payment of his debts by the prosecution to judgment of an action against him. After his decease, they can be reached only by sale upon application of the executor or administrator, and the order or decree of the tribunal to which jurisdiction, for that purpose, has been committed; or, by an action against the heir or devisee, to recover upon the debts the value of the lands which the parties sued may have received, except, of course, judgment debts, where judgments have been rendered in an action commenced before the death of the debtor, when the lands upon which the judgment is a lien may be sold under execution issued thereon.

The fact that the debt may have been secured by a mortgage upon certain lands made by the ancestor, has been held in New York, to have no effect upon the rights of the mortgage creditor in an action against the heirs upon the bond, without first foreclosing the mortgage.

Roosevelt v. Carpenter, 28 Barb. 426.

This was put entirely upon the ground, that the provisions of the statute which gave the creditor his action against the heir, authorized no distinction in that respect, between debts secured by mortgage and those which were not. It is said by Sutherland, J.: "I find neither reason nor authority for holding that the mortgage creditor is confined, in the first instance, to his remedy given by the mortgage against the mortgaged premises; and that he cannot pursue the remedy which the statute gives him against the heirs and all the real estate which they take by descent, on the bond, until he has first exhausted his remedy upon the mortgage."

The statute which gives the creditor an action against the heir, declares that the heirs shall be liable for the debts of the ancestor, arising by simple contract or by specialty, to the extent of the estate descended to them.

2 R. S. 453, § 32.

But the debts of the ancestor are not all in the same order, in regard to the liability of the heir to pay. Some are preferred to others. In New York, debts are divided into three classes in that respect: 1. Debts entitled to a preference under the laws of the United States. 2. Judgments docketed and decrees enrolled against the ancestor, according to the priority thereof. 3. Recognizances, bonds, sealed instruments, notes, bills and unliquidated demands and accounts.

2 R. S. 453, § 37.

The heirs are not allowed to make preferences among debts of the same class. *Id.* § 38.

Similar provisions seem to exist in the statutes and practice of the other States.

The demands which may be enforced against the heir, to the extent of the property descended to him, are limited to those which arise out of contracts; but it is not important whether the contracts are under seal, or in what manner they are witnessed, except so far as it may relate to precedence of one class of demands over another. It is enough to make the heir liable to action, that a debt founded upon contract existed against the ancestor, and that he has lands by descent from the ancestor, for which he has not fully accounted in the payment of other debts against the ancestor, of an equal, or of a superior class.

SECOND. THE PARTIES DEFENDANT AND THEIR RIGHTS OF DEFENSE.

It should not be forgotten, while considering this class of obligations, that the heir is not liable upon the same principle, or to the same extent, as he is liable upon his own contracts, or upon his own debts. Regarded in a mere personal view, independently of his succession to the estate of the

ancestor, the heir is not liable at all. Consequently, the creditor of the ancestor has no claim upon the heir, beyond recovering what the heir may have received by way of inheritance from the ancestor. It is only one of the modes which the law provides to the creditor, for reaching and appropriating property of the debtor after the debtor's decease. In other words, the real estate which may have come to the heir, on the death of the ancestor, is, under certain circumstances, treated as the assets of the ancestor for the purpose of paying his debts; and the suit against the heir, is one of the ways provided in the law for the creditor of the ancestor to reach those assets. That is all the liability imposed by the law upon the heir, to pay the debts of the ancestor.

There are some of the earlier cases which might be mistaken, upon a superficial reading, as holding otherwise. The cases referred to, are those where the plaintiff was allowed to have verdict for the full amount of his debt, without regard to the value of the estate descended to the heir. A critical reading of those cases, will make it plain that the decisions of the courts therein, turned upon a question of pleading, and not upon any rule or principle that the heir was liable, beyond the amount received by him.

Smith v. Angel, reported in 7 Mod. R. 40, and in 2 Ld. Raym. 783, is one of the leading cases in England, touching the liability of the heir to pay the debts of the ancestor. It was an action against an heir on the bond of his ancestor. The execution of the bond was admitted by the pleadings. It was further, in the same way, admitted that the ancestor was seised of the lands, but had leased them for the term of 500 years. This lease for years was made in 1679. The consideration of this lease for the term of 500 years did not consist of a yearly rent, but of the gross sum of £300 paid to the ancestor; but with this provision in the lease, that if the lessor, or his executors or administrators, paid £50 *per annum* to the lessee during his life, then this term of 500 years should cease. It was also admitted, that the reversion of the fee, after the term of 500 years, came to the heir by

descent, but subject to the dower right of the wife of the ancestor.

The case is said to have been several times argued. It was presented to the court upon the demurrer of the plaintiff to the defendant's rejoinder, whereby the facts were admitted by the record, substantially as here stated.

It seems to have been admitted, that the plaintiff was entitled to judgment. The dispute was in regard to the amount which he should recover. The plaintiff claimed to recover the full amount due on the bond. The question is thus stated: Lord Holt delivered the opinion of the court, and, among other things said: "But the question was, what judgment we ought to give him, whether a special one; to have execution of the lands and tenements mentioned in the plea, or generally against him as heir to his ancestor. We have considered both, and we are of opinion there ought to be general judgment against the defendant, by which his body, his goods and his lands, which are not assets, may be taken in execution."

The court resolved that general question into two other and more particular questions: 1, whether the pleading a lease of a term for years by the ancestor, was a full defense; and 2, whether the assignment of dower to the wife was good as a defense.

It seems to have been conceded, that had the lease been for a life or lives, the plea would have been good; and the distinction between the two is thus stated: "What makes complete assets? To have the freehold and inheritance of the estate descend to him, and that he has from his ancestors; therefore he has complete assets. If it were a lease for life made by the ancestor, and only a reversion in fee expectant thereupon had descended from the ancestor, that would not be assets in possession, but a reversion in fee expectant upon an estate for life; and there he had not a freehold, as here he had, but a reversion expectant upon a freehold; besides, it appears by the statute of Gloucester, and of 21 H. 8, that the common law did not much regard estates for years, for

such estate was subject altogether to the will of him in reversion." 7 Mod. page 42.

The opinion of the court, in the same case, is put in different language in 2 Ld. Raym. 784, as follows: "1. As to the first, the question is, whether the heir ought to plead the lease for years in delay of execution of the plaintiffs, or ought to confess *assets* in possession."

Lord Holt said: "He had known the lease pleaded, and therefore he was unwilling to deliver a decisive opinion in that point, because it is not now material in this case; but it seemed to him, that the heir ought not to plead the lease, but ought to confess *assets* in possession, without taking notice of the lease for years; for the having of the freehold and inheritance of the lands of the ancestor descended to the heir, makes complete *assets* in possession. But if the ancestor had made a lease for the life of J. S. and died, and the reversion had descended to the defendant, there he would have had only *assets* in reversion."

The plea of dower right in the wife of the ancestor was held bad, because it could only reach one-third of the land.

That case may be said to have turned upon a question of pleading. The defendant alleged, what he claimed was equivalent to alleging, that he had no *assets* by descent, but his plea, as construed by the court, showed that he had *assets*. That is, he had the reversion of an estate in fee expectant on a term for years, which, as the law then was, and as the common law rule now is, was regarded as a freehold in possession, and the dower right affected only one-third of the premises.

Then came in another rule, in force at that day, that if the defendant "plead a fact which he knows to be false, and it be found against him; as where he says that he has *nothing* by descent, and the jury find that he has *something*, however small it may be, and insufficient to discharge the debt, the plaintiff is entitled to a general judgment for the debt, damages and costs, and to sue out the like execution against him as on a judgment for his own debt, and, therefore, the plaintiff may have a *capias ad satisfaciendum, fieri facias*, or an

elegit for a moiety of all the lands which the heir is seised of, whether by descent or otherwise."

2 Saund. R. 7a, note 4.

It is also, in the same authority, stated to be a general rule, that "at the common law, if the heir had *bona fide* aliened the lands which he had by descent, before an action was commenced against him, he might discharge himself by pleading that he had nothing by descent at the time of suing out the writ, or filing the bill, and the obligee had no remedy at law."

See *Redshaw v. Hester*, 5 Mod. 123; *Jeffrey v. Barrow*, 10 id. 18.

It will be seen by the authorities here cited, that, according to the common law rule, if the jury, upon such issue, found for the defendant, the plaintiff could not recover; but if they found for the plaintiff, the plaintiff had judgment and execution against the defendant, for the full amount of the debt against the ancestor.

The distinction between a lease for life and for years, as made in *Smith v. Angel*, has no foundation upon which to rest in this country. In England, a term for years was not regarded as real estate. In this country the rule is different in some respects. There, the tenant for years was not regarded as vested with an estate in the land, in the full sense of an estate. Here, he has all the rights and remedies of a tenant of an estate in fee, to the full extent of his term.

This question was considered in *Averill v. Taylor*, 8 N. Y. 44; and it was held, that a tenant for years may redeem under a mortgage of the premises made by the lessor before the lease.

The decision was put upon the point, that a term for years, under the new York statute, was real estate. Reference was made to 2 R. S. 359, § 3, and 367, § 24, which provide, the first cited, that certain judgments "shall bind and be a charge upon the lands, tenements, real estate and *chattels real* of every person against whom any such judgment shall be

rendered;" and the second, that the execution to be issued upon said judgment shall command the officer to whom it is directed to "cause the amount of such judgment to be made of the real estate of the person against whom such judgment was rendered," if sufficient goods and chattels cannot be found. Reading these two sections together, it is evident that the law makers regarded estates for years as real estate; otherwise, there is no authority for the sale of such interests under execution, as an interest in land.

But there are other considerations referred to in the opinion, more significant than the language of the statute, to show that a term for years is entitled to be treated as real estate. The tenant for a term of years is regarded in the law, as it now exists, as having, in his tenancy, rights of property in the full sense of the word "property," and as entitled to all the remedies to protect himself in its enjoyment which belong to a tenant for life. The feudal distinction between the two classes of interests has in a measure passed away.

But the rule that the heir might relieve himself of liability, by an alienation of the estate descended, before suit brought, was so changed by the statute, 3 Wm. & M., ch. 14, § 5, as to make the heir liable, notwithstanding he might have aliened the land which came to him by descent, before the commencement of the action against him by the creditor of the intestate; but liable only, in the words of the statute, "to the value of the said lands so by him sold, aliened or made over;" and execution was to issue against such heir, "to the value of the said lands or debts, saving that the lands *bona fide* aliened, before the action brought, shall not be liable to such execution."

It will be readily seen, that the provisions of the statute made it the duty of the jury to find the value of the lands aliened, whenever the heir had sold the lands before suit brought, and whenever the issue of *riens per descent* was found against the defendant. It was the gross, and not the yearly value of the land, which the jury were to find.

The provisions of the statute did not attempt to change the rule or principle of liability of the heir, but only the practice. Instead of finding for the full amount of the debt, in case they found for the plaintiff on the issue, *riens per descent*, the jury were, in all cases, to limit the amount of the verdict to the value of the lands descended, and to find that value when it was not fixed by the agreement of the parties.

That is now substantially the rule and the practice in this country. In New York the statutes are similar to the English statute in that respect, and, consequently, the duty of the jury is similar, whenever the pleadings and the evidence are similar. Whenever it is one of the issues in the pleadings, whether the defendant had lands by descent or not, it is the duty of the jury, not only to find upon that issue, but also when they find that issue for the plaintiff, to find the value of the land which so descended.

Roosevelt v. The Heirs of Fulton, 7 Cow. 71.

In the case here cited, the rule as to the form of the pleading was held as follows: "It seems to be well settled by the common law, that where an action is brought against the heir, on an obligation made by his ancestor, in which he has bound his heirs, in order not to be liable farther than the value of the land descended, it is necessary for him to confess the action, and admit the certainty of the assets. If he pleads a false plea, which is found against him, or if judgment be given by default, or on any other matter or ground, without confessing and showing the certainty of the assets, the plaintiff shall have execution as he should have for the debt of the heir himself on his own bond."

In regard to the statute changes it is said: "The statute 3 and 4 W. and M., S. 5, 6, altered the common law in two respects: 1. By declaring that the heir should be answerable to the value of the land sold or aliened, and that to the plea of *riens per descent*, the plaintiff might reply that he had lands before the original writ brought; and if the issue was

found for the plaintiff, the jury should inquire of the value of the lands, upon which execution should be awarded against the heir. This statute further provides, that if judgment be given against the heir by confession of the action, without confessing the assets descended, or upon demurrer or *nil dicit*, it shall be for the debt or damages, without any writ to inquire of the value of the lands. Whenever the plaintiff replies according to this statute, he is not entitled to a general judgment, as he was at common law, but can only recover the value of the land, which the jury must find."

This case of *Roosevelt v. Heirs of Fulton*, was an action for breach of the covenant of the ancestor. It appeared that by articles of agreement, made between the plaintiff and the defendants' ancestor, the plaintiff had covenanted that he would cause to be conveyed, by letters patent, to the defendants' ancestor, certain lands in Indiana; and the defendants' ancestor had covenanted to pay the plaintiff certain sums of money therefor. The action was brought to recover from the heirs, upon that agreement, the sums of money which the ancestor had agreed to pay. The plaintiff was allowed to have a general verdict. A motion was made upon case and exceptions for a new trial, which was granted. One of the grounds of error was, that the jury should have found the value of the land descended, instead of rendering a general verdict for the full amount of the debt. But that question was made to depend upon the form of the pleadings as they existed in that case, as the law then was.

It has been held in New York, that one who pays a debt which he is not personally bound to pay, and which is not a charge upon his property, is not entitled to be subrogated to a lien which the creditor had upon the estate of the debtor.

Wilkes and others, appellants, v. Harper and others, respondents, 1 N. Y. 586.

In that case Horatio Wilkes was one of several executors, as well as one of several legatees and devisees. He was for a long time permitted by his associate executors to manage

the estate of the testator; and had so far mismanaged and squandered the property that his co-legatees did not and could not obtain their respective shares. After having thus betrayed his trust, H. W. died, and his co-executors and legatees, who had suffered by his defalcations, sought to reach and appropriate to the payment of their shares such real estate of the testator as had passed by devise to H. W.

They had also paid demands due from the testator, which their defaulting associate should have paid, and which they were advised they were liable to pay by reason of his misconduct. They sought to make the amounts so paid, out of the real estate devised to H. W., along with amounts due to them as legatees under the will.

They were opposed by the respondents in the suit, who had recovered a judgment against H. W. before his death, which was a lien on the real estate devised to him. There seem to have been two distinct questions made between the parties: First, whether the amounts due the appellants upon legacies, were entitled to a preference over the judgment of the respondents, as to lands devised to H. W.; and second, whether the debts due from the testator, which had been paid by the appellants, under advice that they were personally liable to pay, entitled the appellants to a preference. Both questions were decided against the appellants.

The grounds of the decision were, that neither class of demands, held by the appellants, were debts due from the testator, of a character to entitle the holder to a claim upon the real estate of which the testator had died seised. The court said: "In either case Horatio would have become the debtor of his co-legatees or devisees, respectively, for their distributive shares of the testator's property. But this would give them no lien either at law or in equity upon the real estate devised to Horatio."

Mersereau v. Ryers, 8 N. Y. 261, was a proceeding by bill in chancery against the heirs of John P. Ryers, who died intestate, to charge them with a debt of the intestate, on account of real estate which had descended to them.

The plaintiff was defeated, on the ground that he failed to show the personal property of the deceased to be insufficient to pay his debt; and that he had not pursued the other alternative, and shown "due proceedings before the proper surrogate's court and at law," to collect the debt, without success. No proceedings to collect the debt had been previously had, either at law, or before the surrogate of the county where the letters of administration had been granted, which was held to be indispensable.

It was contended by the plaintiff that such proceedings were not necessary, in that case, because the administrator resided out of the State; but the court held that that fact did not excuse the plaintiff from taking such proceedings.

The point seems also to have been made that, as the defendants were entitled to the whole estate, both personal and real, it was not important to them out of which the debt was to be paid. But that point was disposed of by the court against the plaintiff, on the ground that the statute makes no exception, but requires the creditor in all cases to seek satisfaction from the personal property, before he resorts to the real estate in the hands of the heir; and, it might have been added, to exhaust such remedies as the law affords for that purpose.

It was also held in this case, that the heir and the personal representative of the deceased cannot be joined in a suit under the statute to charge the heir in respect to lands descended, but that all the heirs must be joined.

The same points were so decided in *Stuart v. Kissam*, 11 Barb. 271, and also in other cases there cited.

See *Wambaugh v. Gates*, 11 Paige, 505; *Butts v. Ganung*, 5 id. 254.

It is no defense on the part of the heir to the debt of the ancestor, that he has sold and conveyed the premises to another, or that he has mortgaged them, or that some creditor of his has procured a judgment against him in advance of proceedings by the creditors of the ancestor. Formerly, at common law, as before shown, such a defense, especially

sale and conveyance before proceedings by the creditor of the ancestor, was a good defense under the issue that the heir had no lands by descent.

But the rule, in that respect, was long since changed by statute in England, as we have before seen, and the ancient common law rule does not now, if it ever did, prevail in any of the States of this country. The heir cannot defeat the creditors of his ancestor in recovering the full value of the land descended, by any act of his own in conveying the estate to others; or by the interposition of his own personal debts. Debts against the ancestor take precedence in that respect to debts against the heir.

In New York, the statute provides that the judgment in the proceedings against the heir, if it appear that the estate descended, was not aliened by the heir at the time of the commencement of the suit, or if he confess the action and show what land has descended to him, "shall be levied of such real estate, and not otherwise." 2 R. S. 454, § 47.

And the next succeeding section of the same statute further provides, that every final decree in such suit shall have preference, as a lien on the real estate descended, to any judgment or decree against such heir personally, for any debt or demand in his own right. Under such a state of facts no personal liability upon the heir is incurred. It is only in case of the alienation of the estate descended, by the heir, before the commencement of suit against him, that personal liability is imposed upon him.

The next succeeding section of the New York statute, provides for that state of facts as follows:

"When it shall appear, in any such suit, that before the commencement thereof, any such heir has aliened the lands, tenements or hereditaments descended to him, or any part thereof, he shall be personally liable for the value."

The New York Revised Laws of 1813, were substantially a copy of the English statutes upon the same subject — 1 R. L. 316 to 318 — and were entitled "*An act for the relief of creditors against heirs and devisees.*"

That revision of the New York statute embraced the provision of the English statute and practice, which made the heir and devisee chargeable for a false plea pleaded. 1 R. L. 316, § 1.

The statutes of New York, of the revision of 1830, are substantially the same as the statutes of 1813, excepting that, in the last revision, the provision as to false pleading is omitted.

The legislation and practice upon this subject in the other States, seem to be similar in all substantial principles and provisions; and wherever there is a difference, it relates chiefly, if not entirely, to the mode and manner of accomplishing the end sought; and that end is, the appropriation of the lands of which the ancestor died seised, or their value, to the payment of his debts.

Morris v. Mowatt, 2 Paige, 586, tried the question of precedence between the creditors of the testator on the one side, and his devisees and their mortgagees on the other. One question mooted was, whether debts due from a testator were entitled to preference, in their payment, to judgments against his devisee, from the proceeds of the same premises; and the priority of the creditors of the testator over the creditors of his devisee was held to prevail, in whatever manner the former may have adopted to secure a lien on the lands. It was held, that the latter could gain nothing, in that respect, by having a mortgage from the heir or devisee, or a judgment against him, after or before the title had vested in him. This precedence of the creditors of the one over the creditors of the other, was held to be secured by statute. 2 R. S. 454, § 48. The statute referred to provides, that every final decree in a suit against the heirs upon debts due from the ancestor, "shall have preference, as a lien on the real estate descended, to any judgment or decree obtained against such heir personally, for any debt or demand in his own right."

It is difficult to conceive how the rule could be otherwise, consistently with the statute which makes the heir liable to a suit. It is evident that, were it otherwise, the heir would

have it in his power to defeat the creditors of the ancestor in reaching the lands descended, by contracting debts of his own in amount sufficient to absorb the whole estate descended. And, in those States where there are statute provisions, as in New York, that the creditor can only have the land descended, except when the heir has aliened the same, the creditor of the ancestor might be deprived of all right by the creditor of the heir.

The heir has the right to contest the claims of creditors to the same extent as the executor or administrator enjoys; and it has been held that a judgment against the administrator is not so far evidence against the heir, as to authorize an order for the sale of the real estate of the decedent, because such judgment does not prove the liability of the heir to pay the debt.

Sandford v. Granger, 12 Barb. 392.

The liability of the heir is made to depend upon facts and circumstances, so different from any liability of other parties, that no one can be joined with him in the action. In *Butts v. Genung*, 5 Paige, 254, the bill was filed against the personal representatives of the decedent and his heir at law, by a creditor, to obtain satisfaction of his debt; and it was held that they could not be sued jointly.

It was also held that the heirs could not be sued at all in New York, until after the expiration of three years from the granting of letters testamentary, or of administration, according to the provision of the Revised Statutes in that respect. 2 R. S. 109, § 53.

Mersereau v. Ryers, 8 N. Y. 261.

This three years is the time appointed, within which application to sell the lands of the decedent, in order to pay his debts, is to be made. 2 R. S. 100, § 1.

As the liability of the heir to pay the debts of the decedent to the amount of property he may receive, has no general common law foundation, but depends upon local laws, it is necessary, in order to make out such liability, to show the

existence of such local laws. Accordingly, where lands in Ohio descended to a person resident in Kentucky, the heir was held not liable for the debts of the decedent, because it did not appear that, by the laws of Ohio, lands were assets in the hands of the heir which made him liable for the debts of the ancestor.

Brown v. Brashford, 11 B. Mon. 67.

But the liability in no way rests in the discretion of courts, and cannot be averted by any judicial decree or judgment, where the necessary facts appear to constitute the liability. This question was passed upon in *Wolf v. Robinson*, 20 Mo. 459.

It may be regarded as the general rule in all the States, that the personal or chattel proper shall be the primary fund for the payment of the debts of the decedent; and, consequently, it is made necessary in all proceedings to appropriate real property to that end, to show an exhaustion of the personal property, and of all means necessary to reach it. So far we have not departed from the principle of the English law.

See *Howe v. Price*, 1 P. Williams' R. 291, and note 1.

In *Roe v. Swesy*, 10 Barb. 251, the points which a creditor must establish in order to maintain an action against an heir to charge him with the debt of his ancestor, are summarily stated as follows:

"Before a creditor can maintain his action against an heir, to charge him with the debt of his ancestor, he must establish the following facts: 1st. The granting of letters testamentary or of administration. 2d. That three years have elapsed after the time of granting such letters, and before the commencement of the action. 3d. That the defendant has inherited lands by descent from the debtor. 4th. The want of sufficient personal assets, or the inability of the plaintiff to collect his debt, or some part thereof, after due proceedings before the proper surrogate and at law."

In that case the action was commenced against the defendants to recover the amount of a promissory note made by the

father of the defendants. The father had died intestate, leaving no personal property ; and no administrator had been appointed. The action was commenced within three years after the death of the debtor.

The court held that the action could not be maintained ; that it was not enough to make out the liability of the heir to show that there was no personal property which could be applied to pay the debt, and that the heirs had received sufficient real estate of the intestate to pay it. Every requisition of the statute was held necessary to be fulfilled before an action against the heir would lie. It was further held, that every requisition of the statute must be complied with, before the plaintiff was in a situation to be entitled to the decision of the court upon the question, whether the defendants took as heirs, or as purchasers, under a certain deed of trust, which was alleged to be involved in the case.

In *Stuart v. Kissam*, 11 Barb. 282, it was held that "a suit at law against the prior parties is an essential preliminary to a right to sue the heirs."

See also *Corwin v. Merritt*, 3 Barb. 341 ; *Wambaugh v. Yates*, 11 Paige, 515.

In the case last above cited it is said : "The issuing of the execution upon the judgment recovered against the executors, did not exhaust the remedy against them for personal estate which had come to their hands and had been misapplied by them. For, under that execution, the sheriff could only levy the debt out of the personal property which still remained in their hands, and which was the proper subject of sale upon execution. The return of such an execution unsatisfied, therefore, was no evidence that there was not in fact sufficient personal property, originally, to satisfy the judgment, or that the debt could not be recovered from the executors personally, if the complainant had taken the proper steps to call them to account before the surrogate."

It is further remarked that "the complainant, therefore, was bound to proceed against the surviving executor personally, for the satisfaction of his debt, before he could resort to

the interest of these legatees in the real estate upon which their legacies were liens."

The statutes of the different States differ in many respects as to the proceedings necessary to be taken preliminary to an action or proceedings against the heir upon the debts of the ancestor; but the general principles which make such preliminary proceedings necessary are alike in all the States, and must necessarily be alike; for the action against the heir is only one of the modes provided by statute to the creditor to reach and appropriate the lands of the decedent, which may have descended to the heir, to the payment of the debts of the decedent. It is a proceeding given by statute in derogation of the common law rights of the heir, and must be pursued in the strictest manner and in every particular.

CHAPTER VIII.

THE LINE OF SUCCESSION, OR, IN OTHER WORDS,
WHAT PERSONS ARE HEIRS, AND THE ORDER
IN WHICH THEY ARE TO SUCCEED EACH OTHER.
THREE GENERAL CLASSES—THE ASCENDING, DE-
SCENDING AND COLLATERAL LINES.

SECTION I.

THE WORD "HEIRS," AS USED IN THE LAW; WHAT IS MEANT BY IT, AND HOW IT
CAME INTO USE.

SECTION II.

THE COMMON LAW CANONS OF DESCENT; ORIGIN AND FOUNDATION OF.

SECTION III.

THE LAWS OF THE SEVERAL STATES, AS COMPARED WITH THE COMMON LAW CANONS
OF DESCENT.

SECTION I.

THE WORD "HEIRS," AS USED IN THE LAW; WHAT IS MEANT BY
IT, AND HOW IT CAME INTO USE.

The word "heir," as used in the law, is defined as the person upon whom the law casts the estate immediately on the death of the ancestor.

It is true, as a general rule, that the law designates who is to be the heir, and permits of no change in that respect by individual nominations. In more modern times, individuals have been permitted by law to devise their hereditaments to any person or persons they pleased, who were capable, by the laws of the State where the property was located, of holding estates of inheritance. They were thus empowered to defeat the succession of those persons who were designated by law to succeed to the estate as heirs.

But in no case has an individual been permitted to appoint persons to be his heirs, differently from what the law appoints.

The general principles of the law, in regard to the succession of one person as the heir of another, to that species of property known as hereditaments, have been, for the most part, derived from the feudal law; and have been regarded so essential an element to the very existence of the feudal system, that consistency and policy did not permit individuals to make changes in the line of succession predestinated by the law.

For example, the very existence of a feudal aristocracy depended upon the rule that the line of succession should be confined to the oldest son, instead of the children generally. A law giving the right of succession to children generally, would have dissipated the system in a few generations. So, on the other hand, a government founded on individual equality and the personal freedom of all alike, could not long survive a policy which confined the right of succession to some one of a family to the disherison of all the others.

The reader can hardly fail to perceive, that this subject of succession, or, more particularly, the line of succession, is not important merely to the law and to the lawyer; but embraces the fundamental policies of the different forms of government, and is a part, not merely of the jurisprudence, but of the political history of nations.

A practical view of the design and operation of the feudal policy of succession may aid the reader in acquiring a familiar understanding of the subject of the line of descents, as that line has been established under different governments, and as it now exists in the different States of this country.

Under the feudal system, the heir succeeded to the ancestor in certain things, not merely because those things were property, but because therein certain rights were bestowed and certain duties imposed, upon the ancestor and the heir alike, from generation to generation, indefinitely. Those

rights and duties were not exclusively of a private and personal nature, but partook, indirectly at least, largely of a public and political character.

It is true, the heir succeeded merely to certain contract rights and certain contract obligations, which had belonged to and rested upon the ancestor in his life-time. He did not succeed to all the property. The contract rights and obligations to which he did succeed constituted what the law then denominated, and what it still denominates, hereditaments.

These rights took the name hereditaments, as before explained, merely from the fact that the heir did succeed the ancestor as the party to the contract in the place of the latter.

As this incident of succession did not attach to all contracts alike, but only to a certain class of contracts, it is only necessary to notice the peculiarities of that class to be convinced of the truth of what we have here stated, as to the political policy which was originally involved therein.

The contracts, which were thus made the subject of succession from the ancestor to the heir, were grants of land to the grantee and his heirs. They were contracts executed, the obligations of which upon the party of the first part gave to the party of the second part the right of possession and occupation of the premises described. In more modern language, they were leases in fee of land. There was first, in all cases, a grant from the king or sovereign. His grantees, as the consideration for the grant, were bound, in the early days of the feudal system, to perform certain military services yearly, as occasion might require. The military power of the government rested upon the obligations of that class of contracts. Its efficiency and permanency, therefore, could be secured only by making the obligations of the contracting parties binding on each succeeding generation, as the preceding generation passed away. Thus the continuity of the military power, and, consequently, of the sovereignty itself, was secured, chiefly by this established line of succession between the heir and the ancestor, and the accompanying contract rights and duties.

Similar grants were made in consideration of services other than military, and in consideration of rents to be paid in the produce of the land, or in money. The revenue of the sovereign was derived chiefly from such sources. It is evident, therefore, that it was essential to the existence of the government, that obligations of that class should fall upon each generation, as it assumed its active part in life, and, especially, in the affairs of the State.

The grantees and tenants of the King were also allowed, in the earlier ages of feudalism, to make grants in fee; whereupon they were known as chief lords. Their grantees, in turn, could make similar grants, when they were known as mesne lords. In those grants they secured to themselves services and rents, by obligations therein imposed upon the grantees, to which this rule of succession equally applied. These subordinate arrangements contributed also to the strength and permanency of the government; and equally demanded to be continued from one generation to another, as means of strength and security to the political fabric of which they composed a material part.

1 Prescott's Robertson's History of Charles V. 15, 16.

Such were the contract rights and obligations to which the rule of succession of the heir to the ancestor applied. Such was the origin of hereditaments, as they have come down to us in the common law, modified by different statutes.

They were peculiar in two respects: first, they were made up of contracts of lease of lands; second, these contracts, in their terms and legal construction, extended to and embraced the heirs of the contracting parties. Other contracts constituted property, but none other passed by descent in the early times of the feudal law. The ancestor might die possessed of other property, either chattel or choses in action; but that species of property did not pass by descent. It went to personal representatives, either executors or administrators, and through them the proceeds only came to the heirs or legatees.

In some, if not all, feudal governments, it became the custom to grant offices of trust, and titles of honor, and other things called incorporeal hereditaments, which we have before noticed, and to treat such grants as things which descended to the heirs. So far as the rule of descent was concerned, they were assimilated in a measure to the corporeal hereditaments; but they partook of the feudal character in no other respect. The law of succession to political power was governed by like rules with the law of succession to real property. There was a similarity in another respect. There were stipendiary emoluments and privileges on the one side, and duties and obligations therefor on the other.

The military character of the feudal system was left behind some centuries ago, and never had a foothold on this continent. It answered the purpose of a semi-barbarous period, but was wholly inadequate to meet the wants of any thing beyond that. Many of the other peculiarities of that system have also long since been disused, especially in this country. We have, however, retained one feature. Estates in fee in land pass from the ancestor to the heir in cases of intestacy. The grant in fee of land is still regarded, in the law, as a contract to which the heir succeeds the ancestor as the party of the second part, whenever the ancestor dies seised and intestate. So far the original feature of the feudal system is preserved without change. But in this country, as the State is, in all cases of estates in fee, the party of the first part to the contract of grant, it is the party of the second part alone to whom the rule of succession applies; and we have come to regard the land only as the property which descends; we lose sight of the grant or contract which gives the right of possession to the land, because there neither are nor can be, in this country, rents or services imposed upon the heir as incidents of the estate. He merely acquires rights with no obligations additional to what fall upon every citizen of the State. But it is none the less true in fact, that the rights to which he succeeds are merely contract rights. Every other species of property, whether chattels or choses in action,

pass to the personal representatives of the deceased, and the proceeds alone come to the heirs. And when we search for the foundation upon which this distinction rests, we find now, as it was in the feudal law, that the estate in fee in land descends to the heir, because the right thereto depends upon the grant or lease which created the estate, and the heir succeeds because he is one of the nominees of the contract; while no other kind of property is based upon a like contract.

In fixing upon the person to be the heir, the law follows the line of consanguinity. This seems to have been the general rule to which there have been no exceptions at common law. In this country some exceptions exist by statute.

Consanguinity is regarded, in connection with this subject, as of two kinds, namely: lineal and collateral. Lineal denotes that which subsists between those who trace their origin in a direct line to the same ancestor; as, for example, from son to father, from father to grandfather and from grandfather to great-grandfather.

2 Bl. Com. 203, 204; 3 Cruise Dig. T. 29, ch. 2, §§ 2, 3.

Collateral consanguinity is that which exists between those who derive their origin from a common ancestor, but through a different channel of descent, and not the one from the other. For example, brothers and their children respectively, are to each other in collateral consanguinity. The sons and daughters of the one son are in collateral consanguinity with the sons and daughters of the other son.

The lines of consanguinity, both lineal and collateral, are measured by degrees. The common law mode of computation is the one generally adopted in this country. It begins with the common ancestor and counts downward, each successive descendant of the other counting one. In determining the degree of kindred or consanguinity between two persons, who derive their origin from a common ancestor, the common law rule is to begin at the common ancestor and count down to the one most remote. His number in the course of descent indicates the degree of relationship between the two.

2 Bl. Com. 206, 207; 3 Cruise Dig. tit. 29, ch. 2, § 6.

Brothers are, under that rule, related in the first degree, because neither is removed from the father only one degree. A brother and his nephew would be in the second degree, because the nephew is two degrees removed from the common ancestor.

By the civil law, in order to ascertain the degree of consanguinity between two persons, the rule requires a count from the one up to the common stock and then down to the other, counting, both ways, a degree for each person. This places brothers in the second degree and their children in the fourth, while each brother would be, in relation to the children of the other brother, in the third degree.

Smith on R. and P. Prop. 325.

The word *heir* has a more comprehensive meaning in the popular understanding than in its legal signification. No person can, in law, be the heir of another while that other lives. *Nemo est hæres viventis.*

2 Bl. Com. 208.

During the life-time of the immediate ancestor, he who, in popular understanding, is the heir, is, in the language of the law, either heir apparent or heir presumptive. The distinction between the two is this: The heir apparent is one whose right of inheritance cannot be defeated, if he outlives the ancestor. In the language of Blackstone, "heirs apparent are such whose right of inheritance is indefeasible, provided they outlive the ancestor; as the eldest son or his issue, who must, by the course of the common law, be heir to the father whenever he happens to die."

2 Bl. Com. 208.

In other words, an heir apparent is one whose right of inheritance requires nothing to make it complete, except the death of the ancestor, and who is not liable to be defeated by any intervening circumstances.

"Heirs presumptive are such who, if the ancestor should die immediately, would, in the present circumstances of

things, be his heirs, but whose right of inheritance may be defeated by the contingency of some nearer heir being born ; as a brother, or nephew, whose presumptive succession may be destroyed by the birth of a child ; or a daughter, whose present hopes may be hereafter cut off by the birth of a son."

2 Bl. Com. 208.

The examples here quoted from Blackstone are adapted to the common law canons of descent, and do not all apply to the rules of succession established in this country. But they illustrate the distinctions between an heir apparent and an heir presumptive. They seem also to be adapted merely to the law as it existed before tenants in fee enjoyed the right of alienation. The term *heir apparent* may not be strictly applicable where, as is the case generally in this country, the ancestor enjoys the right of diverting the inheritance from the established course of descent, by testamentary alienation and otherwise. In such case the heir can hardly be regarded as anything more than heir presumptive, while the ancestor lives, because he is liable to be defeated in the succession by any transfer of the estate from the ancestor in his life-time, as well as by his testamentary disposition of it. The term *apparent*, when applied in this country, must be understood with this qualification : that it signifies that the person indicated is not liable to be defeated in the succession, by the intervention of any other person as the heir.

There are some considerations, of a general character, which distinguish the laws regulating the line of descent, and the order in which kindred shall succeed each other, that demand to be borne in mind, to the end that the character of such laws may be duly appreciated. As before explained, the only real property which descends, consists of the rights or interests of the grantee, secured to him and his heirs by the grant or lease in fee, under which he holds the right to the possession and enjoyment of certain lands. A person who has the capacity to hold an estate in fee may become the party to such grant or lease, as we have before seen, by

devise or assignment, as effectually as though he was the original grantee. If he dies intestate while he remains such party, his death does not terminate the contract of grant or lease. That survives, because by its very terms it was made to the grantee and his heirs. But the particular nominee or nominees who are to become the heirs are not named in the contract, and are not permitted to be designated and fixed by a personal nomination therein. The law provides for that by certain rules of a general character, by the application of which the particular person or persons who are to succeed the intestate as the party or parties to the contract of grant or lease, are designated and fixed on the event of his death. These rules constitute the laws of descent, and have been sometimes distinguished as the canons of descent. They merely fix the order in which kindred shall succeed kindred as heirs, or, in other words, as parties, to that class of contract rights which are known as hereditaments.

Vermont seems to be the only State that has attempted, by special legislation, to declare one person the heir at law of another, except where there has been legislation declaring illegitimate children capacitated to inherit. *Moore v. The Estate of Moore*, 35 Verm. 98, is a case which arose under an act of that kind.

There was a special act declaring, that Amanda M. Pennock "is hereby constituted heir at law of John B. and Sally Dunbar, in as full and perfect manner as if she had been the daughter of the said John B. and Sally Dunbar, born in lawful wedlock."

Both Mrs. Dunbar and her brother, Richard Moore, afterwards died. Amanda had become the wife of a man by the name of Wright. The question was, whether Mrs. W. was entitled to the rights of an heir of Richard Moore.

His sister, Mrs. Dunbar, died before he did. She would have been his heir at law had she survived him. It was conceded that, had she survived and taken the property by descent from her brother, it would have passed by descent from her, on her decease intestate, to Mrs. W. by virtue of

the special act. But it was held, that Mrs. W. did not by that act become the heir of Richard Moore, and was not thereby entitled to take by right of representation through Mrs. Dunbar.

The position of the court is expressed in the opinion as follows :

“If Mrs. Wright is entitled to share in the estate of Richard Moore, it must be as one of his heirs, and not as heir to Mrs. Dunbar, because she never had any right or interest in the estate whatever. If it were competent for the legislature to enact that Mrs. Wright should be heir at law to Mr. and Mrs. Dunbar, and also be an heir at law to the estate of any other person by representation, as their children would be, by their signifying their assent to the act, they have not done so. She is merely made heir at law of Mr. and Mrs. Dunbar, to share as their child. It is not enacted that she is their child ; or that she is to be considered and taken in law as their child. The act does not make her the heir of Richard Moore, or confer upon her any right of heirship to others, by right of representation. We cannot go further than the statute, which merely authorizes her to take directly as heir from Mr. and Mrs. Dunbar.”

This case serves to elucidate the meaning of the word *heir*, as used in the law to indicate who is to be the successor to an estate of inheritance, in all the various relations of consanguinity. It might not unnaturally be the first impression, that a legislative declaration that A. is constituted the heir of B. “in as full and perfect manner” as if A. had been the natural son of B., born in lawful wedlock, indicated the intention to bestow on A. all the capacities of an heir necessary to take by inheritance, in any of the relations of consanguinity recognized in the canons of descent. But the argument of the court shows quite plainly that such an impression would be superficial and incorrect.

A similar construction has been given to legislation in regard to bastards, which will be noticed in connection with that subject.

In Pennsylvania, in the case of *Killam v. Killam*, 39 Penn. St. R. 120, it was held that an estate, already descended to the legal heir, cannot by a subsequent act of legislation be divested and given to another.

SECTION II.

THE COMMON LAW CANONS OF DESCENT; ORIGIN AND FOUNDATION OF.

The rules of descent, as ultimately established by the common law, are generally enumerated in the text-books as canons of descent.

The rules, so distinguished, relate only to the line of descent, and to the order in which kindred are to succeed each other. They have been so far superseded by statute rules in this country as to be of little practical importance, except as they show the source from whence the statute rules have been derived, and may aid in understanding and construing the statutes.

As enumerated by Blackstone, these canons are seven in number.

1. "The first rule is, that inheritances shall lineally descend to the issue of the person who last died seised, *in infinitum*, but shall never lineally ascend."

2 Bl. Com. 208.

This rule was derived from the feudal law. Estates, under the feudal system descended, but never ascended.

It seems to have been a part of the ambition of some of the early law-writers to find authority for this rule, of a kind greater than human.

Co. Litt. 11a; Ratcliffe's Case, Co. Rep. 40; 2 Bl. Com. 210.

The laws of Moses, and even the laws of nature, have sometimes been referred to as the original source. But it seems to be idle to look to any other source than the institution and establishment of feudal tenures. The maxim

hæreditas nunquam ascendit, was proclaimed as an established rule in England by the early writers.

Blackstone, in commenting upon this rule, says: "I think there is no doubt to be made but that it was introduced at the same time with, and in consequences of, the feudal tenures."

2 Bl. Com. 211.

And after considering the subject of the origin of the rule
× at some length, he expresses his final conclusion as follows:

"These reasons, drawn from the history of the rule itself, seem to be more satisfactory than that quaint one of Bracton, adopted by Sir Edward Coke, which regulates the descent of lands according to the laws of gravitation."

2 Bl. Com. 212.

There were two peculiarities in the feudal constitution which favored such a rule, if they did not absolutely demand it. Estates of inheritance could pass from one individual to another only by descent. The lineal descendant was compelled to wait the death of his ancestor before he could succeed to the tenancy. This was so in all ancestral feuds. It was impossible that the father could succeed the son. The original feudal law gave no opportunity for such succession.

There was another reason for the rule, more general in its application and more imperative in its demands. It was a military necessity of the feudal organization. Old men were unfitted for the military services required. That military necessity constituted all that can be claimed of divinity in the origin of this rule. The North American Indian practices upon the same rule, in selecting young men, instead of old, for war. And the statute regulations of the different States, which limit military requisitions to the age of forty-five, or to some earlier period, are founded upon the same physical policy. They seek to make soldiers of the sons, not of the fathers.

This rule has been changed in England by a statute before noticed. So that, instead of a lineal descent to the issue of

the person last seised, the descent is to the issue of the last purchaser. It is not necessary that the person thus made the stock of descent should have been seised or actually in possession. It is enough that he was the tenant in fee, and that he did not come to the title by inheritance. The term "purchaser" is so defined in the statute as to embrace practically every mode of acquiring title, except that of succession thereto by descent. The person who takes the title by inheritance cannot be the source of title, but his heirs must trace the right back to the person from whom he inherited, at least. And if that person also took by inheritance, the heirs must go still further back, until they find an owner who did not inherit.

The real property commissioners proposed to make every person who had the title, the stock of descent, without regard to the mode of acquisition. That would have been an adoption of the American rule. But parliament changed the proposition so as to confine the source, from which descent was to be reckoned, to the person last entitled who did not inherit.

Williams on Real Prop. 78.

2. The second of the common law canons is, that males are preferred to females.

In the language of Blackstone: "Thus sons shall be admitted before daughters; or, as our male law givers have somewhat uncomplaisantly expressed it, the worthiest of blood shall be preferred." 2 Bl. Com. 213. The same author remarks: "This preference of males to females is entirely agreeable to the law of succession among the Jews, and also among the States of Greece, or at least among the Athenians; but was totally unknown to the laws of Rome (such of them, I mean, as are at present extant), wherein brethren and sisters were allowed to succeed to equal portions of the inheritance."

2 Bl. Com. 213.

The principle which underlies that rule might be traced back to a much earlier period than those named by Blackstone. Preference of males over females belongs to man as a savage,

and rests upon the rule governing the brute, that might makes right. If there is any divinity in that rule, this second canon of the common law cannot be denied divine origin.

It is not, however, necessary to go back so far to find a foundation. Military necessity sufficiently sustained this rule also of the feudal law. Men were then, as now, better fitted for military service than women. The feudal government required soldiers, and had no means to get them except through the feudal compact.

Blackstone says: "The true reason of preferring the males must be deduced from feudal principles; for by the genuine and original policy of that constitution no female could ever succeed to a proper feud, inasmuch as they were incapable of performing those military services, for the sake of which that system was established."

2 Bl. Com. 214.

Chancellor Kent says: "Females were totally excluded, not only from their inability to perform the feudal engagements, but because they might, by marriage, transfer the possession of the feud to strangers and enemies."

4 Kent, 383.

Some of the earlier writers assumed to base the distinction upon what they designated as dignity of blood, instead of proximity. Lord Hale expressed the grounds of the distinction as follows: "In descents the law prefers the worthiest of blood; therefore, the son inherits, and excludes the daughter. The brother is preferred before the sister, the uncle before the aunt."

3 Cruise, 377, §20.

That seems to have been the prevailing idea of all rude nations. They tested the comparative merits by the standard of physical prowess.

3. "A third rule or canon of descent is this, that where there are two or more males, in equal degree, the eldest only shall inherit, but the females altogether."

2 Bl. Com. 214.

This rule is commonly distinguished as the law of primogeniture, and is also to be attributed chiefly to the military necessities of the feudal system, and other peculiarities of the feudal constitution, which were indispensable to its very existence. Blackstone says that it was "enforced by the inconveniences that attended the splitting of estates, namely, the division of military services, the multitude of infant tenants incapable of performing any duty, the consequential weakening of the strength of the kingdom, and the inducing younger sons to take up with the business and idleness of a country life, instead of being serviceable to themselves and the public, by engaging in mercantile, in military, in civil or in ecclesiastical employments. These reasons occasioned an almost total change in the method of feudal inheritances abroad; so that the eldest male began universally to succeed to the whole of the lands in all military tenures; and in this condition the feudal constitution was established in England by William the Conqueror."

It is remarked by Cruise, that "as to females, all being equally incapable of performing any military service, there could be no reason for preferring the eldest."

3 Cruise, 378, § 24.

They took "altogether;" that is, as coparceners, whenever they took at all. They enjoyed the right of forcing a partition of the premises without the consent of all. Any one could compel partition. The reason for this distinction in favor of female heirs, was, that "as the estate in coparcenary was cast on them by the act of the law, and not by their own agreement, it was thought right that the perverseness of one should not prevent the others from obtaining a more beneficial method of enjoying the property."

Williams on Real Prop. 81.

After the lands are partitioned, each of the heirs holds in severalty; but is regarded as holding by descent and not by purchase.

There is nothing in the taking or holding of estates by descent, by females, which distinguishes their rights from males, after the estate has vested. The distinction lies in vesting the whole in the oldest of the males, and excluding all others. There could be no taking together among them.

4. "A fourth rule, or canon of descent, is this: that the lineal descendants, *in infinitum*, of any person deceased, shall represent their ancestor; that is, shall stand in the same place as the person himself would have done had he been living."

2 Bl. Com. 316.

For example, A. has three children; one of them dies, leaving two children; and then A. dies, seised of an estate of inheritance, and intestate. This estate would descend in three equal shares; one share to each of the children surviving the intestate, and one share to the two children of the deceased child, to be equally divided between them. The two grandchildren of A. are thus placed in precisely the position which his deceased child would have occupied had he survived A.

The two grandchildren are said to take by representation, or *per stirpes*, because, together, they represent the deceased child.

Had they been entitled each to an equal share with the living children, they would be said to take *per capita*. In such case, the estate would have descended in four equal shares, instead of three; a share to each child, and an equal share to each grandchild.

If the property to be divided was worth \$60,000, the children who survived the father would have \$20,000 each, and the children of the deceased child \$10,000 each, according to the rule of taking by representation, or *per stirpes*. While if it was to be divided *per capita*, each child and grandchild alike, would take \$15,000.

Applied to the English practice of primogeniture, the result is thus stated, by Cruise, quoting from Lord Hale: "Hence it is, that the son or grandchild, whether son or

daughter, of the eldest son, succeeds before the younger son ; and the son or grandchild of the eldest brother before the youngest brother. And so through all the degrees of succession, by the right of representation ; the right of proximity is transferred from the root to the branches, and gives them the same preference as the next and worthiest of the blood."

" This right, transferred by representation, is infinite and unlimited in the degree of those that descend from the represented."

8 Cruise Dig. 379, §§ 26, 27.

5. " The fifth rule is, that on failure of lineal descendants, or issue of the person last seised, the inheritance shall descend to his collateral relations, being of the blood of the first purchaser, subject to the three preceding rules."

2 Bl. Com. 220.

As an example under this rule, suppose A. became a tenant in fee by being the original grantee of the estate, or by becoming the tenant by purchase and assignment, and dies intestate, whereby the estate descends to B. his oldest son, and B. dies without issue, intestate. In seeking for an heir who shall succeed B. under this rule, we must find some one of the blood of A., the first purchaser, because A. is regarded, in the feudal law, as the person who first acquired the estate to his family. He stands in the place of the original party of the second part to the lease, and his heirs are regarded as the other parties thereto, embraced and indicated in the conveyance to A. and his heirs. When, therefore, there is a failure of lineal descendants to A., the collateral relations of the blood of A. succeed to the contract of grant or lease, as being the next nominees of the grant.

It is stated as a consequence of this rule, that " when feuds first began to be hereditary, it was made a necessary qualification of the heir who would succeed to a feud, that he should be of the blood of, that is, lineally descended from the first feudatory or purchaser. In consequence whereof, if a vassal died seised of a feud of his own acquiring, or *feudum novum*,

it could not descend to any but his own offspring. No, not even to his brother, because he was not descended, nor derived his blood from the first acquirer. But if it was *feudum antiquum*, that is, one descended to the vassal from his ancestors, then his brother, or such other collateral relation as was descended and derived his blood from the first feudatory, might succeed to such inheritance."

2 Bl. Com. 221.

To avoid the consequences of that rule, another rule, of a fictitious character, was adopted, that "every grant of lands in fee simple is with us a *feudum novum* to be held *ut antiquum*, as a feud whose antiquity is indefinite; and, therefore, the collateral kindred of the grantee, or descendants from any of his lineal ancestors, by whom the lands might have possibly been purchased, are capable of being called to the inheritance."

2 Bl. Com. 222.

Accordingly, Blackstone states the principle of descents to collateral relations, as follows:

"This, then, is the great and general principle upon which the law of collateral inheritances depend; that, upon failure of issue in the last proprietor, the estate shall descend to the blood of the first purchaser; or that it shall result back to the heirs of the body of that ancestor, from whom it either really has, or is supposed by fiction of law to have, originally descended."

2 Bl. Com. 223.

This rule of the feudal law was changed in England by the statute before referred to, so that now, on failure of lineal descendants, the estate descends to the nearest lineal ancestor, instead of his collateral relations.

Williams on Real Prop. 88.

6. A sixth rule or canon, therefore, is, that the collateral heir of the person last seised must be his next collateral kinsman of the whole blood.

2 Bl. Com. 224.

"First, he must be his next collateral kinsman, either personally or *jure representationis*, which proximity is reckoned according to the canonical degrees of consanguinity before mentioned. Therefore, the brother being in the first degree, he and his descendants shall exclude the uncle and his issue, who is only in the second."

2 Bl. Com. 224.

"But, secondly, the heir need not be the nearest kinsman absolutely, but only *sub modo*: that is, he must be the nearest kinsman of the whole blood; for if there be a much nearer kinsman of the half blood, a distant kinsman of the whole blood shall be admitted, and the other entirely excluded. Nay, the estate shall escheat to the lord, sooner than the half blood shall inherit."

2 Bl. Com. 227.

The reason of this rule was feudal in its character, and designed to select as heirs those who could most directly make out a pedigree from the original feudatory or lessee. Those who could derive their origin from the same couple of ancestors were likely to be nearer to the original party than those who had only one common ancestor.

"The rule then, together with its illustration, amounts to this, that, in order to keep the estate of John Stiles as nearly as possible in the line of his purchasing ancestor, it must descend to the issue of the nearest couple of ancestors that have left descendants behind them; because the descendants of one ancestor only are not so likely to be in the line of that purchasing ancestor, as those who are descended from both."

2 Bl. Com. 233.

7. "The seventh and last rule or canon is, that in collateral inheritances the male stock shall be preferred to the female (that is, kindred derived from the blood of the male ancestors, however remote, shall be admitted before those from the blood of the female, however near), unless where the lands have, in fact, descended from a female."

2 Bl. Com. 234.

Under this rule the relations on the father's side were preferred to relations on the mother's-side. Relations on the side of the mother were never admitted to inherit, so long as relations on the father's side, however remote, could be found who were capacitated to inherit.

This rule or canon is nothing more than an extension of the second canon, or the principles thereof, to collateral relations. It is said in Williams on Real Property, 85, that "this strict and careful preference of the male to the female line was in full accordance with the spirit of the feudal system, which, being essentially military in its nature, imposed obligations by no means easy for a female to fulfill; and those who were unable to perform the services, could not expect to enjoy the benefits."

But that author concedes that the military reason will not furnish a complete explanation of the preference of males to females in the order of descent. It seems to have been a custom which prevailed before the feudal organization; and he says: "The true reason of the preference appears to lie in the degraded position in society which, in ancient times, was held by females; a position arising from their deficiency in that kind of might which then too frequently made the right."

Williams on Real Prop. 86.

This principle of preferring males to females, was not eradicated from the English laws by the recent legislation amending the laws of descent. "And the father and all his most distant relatives have priority over the mother of the purchaser. She cannot succeed as his heir until all the paternal ancestors of the purchaser, both male and female, and their respective families, have been exhausted."

Williams on Real Prop. 86.

Whatever may have favored the origin of this preference, founded exclusively upon sex, in its beginning, it is idle, at this day, to seek for a justification in the ancient military reason. It now has no foundation to rest upon, except the

standard of physical prowess and the prejudices which civilization and Christianity have not yet succeeded in eradicating.

Although the feudal or common law canons of descent are embodied in seven formal propositions, there are not that number of distinct principles enunciated therein.

The principles embraced in the seven propositions were, the exclusion of lineal ascendants, the precedence of males to females, primogeniture among males, the principle of representation and the exclusion of kindred of the half blood. In the reformation which have taken place in English legislation, only three of these leading principles now remain in the laws of that country, namely: The preference of males to females, primogeniture, and the principle of representation.

As to kinsmen of the half blood, they are not now, as formerly, excluded entirely from succession to estates of inheritance, but are let in, next in order to kinsmen in the same degree of the whole blood.

3 and 4 Wm. IV. ch. 106.

The act here cited conformed the laws of England, in regard to the canons of descent, more to the rules established in this country, than were the common law rules as they before existed. But notwithstanding the reformation thus made, the difference in some of the leading principles between that country and this, in respect to the subject under consideration, is as great as the difference which exists between the feudal and the allodial systems of tenure.

We have copied from Blackstone the canons of descent of the feudal or common law, because they seem to be the copy most referred to in the reported cases. There is another rendering of the same rules, in 2 Hale's Common Law, 114, as follows:

1. In descents, the law prefers the worthiest of blood.
2. The next of blood is preferred before the more remote, though equally or more worthy.

descent, that he should have been seised in the common law sense of that term. It is enough that he had the title in fee at the time of his death. But we have sufficiently examined the point of seisin in a preceding chapter. Nor is it material in this country, as it is in England, how or in what manner the owner acquired his title. It is not in the way of his being regarded as the root or stock of descent that he acquired his title by descent.

Upon this point, it is easy to perceive traces of substantial difference between the feudal system of tenures and the allodial. In England, it is regarded as matter of importance to derive the title of every estate of inheritance from the party to whom it was originally granted. In other words, the stock of descent is to be found only in the original lessee. So important is that matter regarded, that in those cases where it is impossible to trace the line of title back to the original source, the law fixes upon the first party who came to the title by purchase, and, by a kind of legal fiction, constitutes or treats him as the original lessee, or the identical party who received the grant to himself and his heirs, and who agreed, either expressly or impliedly, for himself and his heirs, to render services and rents in return therefor. Treating him as the original contracting party, then his heirs, as the nominees to the contract, indicated by the general designation of heirs of the real or supposed contracting party, succeed him on his decease as the parties thereto next entitled, because next in order, they are embraced in the terms of the contract.

It is easy to be seen that it would not be consistent with that view of the estate, to treat one who had come to the estate by inheritance, as the stock of descent. The grant was not made to him and his heirs. He came in only as heir to some one else, who either was, or was assumed to have been, the original party. It is possible that his heirs may not be the heirs of the original party. But whether so or not, it is enough that the grant was not to him and his heirs. He is a party to the contract, merely because he happens to come within the description of heir of the original

party; but his heirs are not necessarily embraced in that description, and certainly he is not the root of descent. At most, he is only one of the branches.

Taking that view of an estate in fee, the student can understand the foundation upon which the feudal rule of descent rests, and the reason why the recent English statute is careful to exclude all who derive title by inheritance from being regarded as the stock of descent.

In this country, it is true, that estates of inheritance are derived from a grant of the State, and, in like manner to England, are constituted and subsist by virtue thereof; but the tenure is allodial. It works no mischief to the rights of individuals, or to the constitution of the government, to treat every owner of an estate of inheritance as the stock or root of descent, whether he became such owner as the original grantee, as the purchaser, or by inheritance. Neither the policy of our political institutions, nor the rights of individuals, can be jeopardized thereby; and that rule has, consequently, been established here. Therein the law of England differs from ours; and the foundation upon which that difference rests lies in the difference between the feudal and allodial systems of tenure.

The statutes of the several States upon this point are substantially alike in their phraseology. In New York it is provided that "the real estate of every person who shall die without devising the same, shall descend in manner following: 1st, to his lineal descendants; 2d, to his father; 3d, to his mother, and 4th, to his collateral relatives, subject in all cases to the rules and regulations hereinafter prescribed."

1 R. S. 751, § 1.

In most of the States, the provision corresponding to the first is, that the estate shall descend to the children of the intestate, or their descendants or representatives. This first stage in the progress of succession among the different degrees of kindred is not, however, entirely uniform in the legislation of the different States.

In California, the corresponding provision is that, if there be a surviving husband or wife, and only one child, or the issue of one child, or more than one, or one and the issue of one or more, one-third descends to the surviving husband or wife, and the remainder to the children or their descendants; and, if there be no child living, to lineal descendants.

In Georgia, the estate descends to the widow and children in equal shares.

In Indiana, the wife surviving, takes one-third in fee.

In South Carolina, one-third of the estate goes to the widow in fee, and the remainder to the children.

With these four exceptions, the rule remains in substance and effect, as in the first of the common law canons, as to this first stage in the order of succession.

That part of the feudal rule which provides that an estate shall never lineally ascend, has been generally disused in this country. The ascending line of succession is allowed a preference to the collateral, in most, if not all, the States: the only difference between them is as to the place in the collateral line where they are let in.

2d. The second of the common law canons of descent, which prefers males to females, has not been adopted in this country. Our political institutions are not subject to any such necessities, while our social condition has reached a more progressed order of civilization and propriety.

3d. The third canon, which prefers the oldest of the male descendants to all others, to the extent of excluding all the others, has no existence in this country. All the children of the intestate take together as one heir, and each is entitled to an equal share. Primogeniture, which has been the corner stone of English institutions, has no place among ours. Kindred of the same degree of consanguinity to the intestate stock of descent take as coparceners or tenants in common.

4th. The fourth canon, which regulates the manner and order of succession *per stirpes*, instead of *per capita*, where there are heirs standing to the stock of descent in different degrees of consanguinity, is substantially the law of all the

States; in some to the full extent; in others to a limited extent.

Lineal descendants in all the States take *per stirpes* and not *per capita*, where they are removed from the root or stock of descent in different degrees.

For example: where the intestate leaves four children living, and children of one deceased child, his estate is divided into five equal shares, the same as though his five children had all survived him. There is a share or interest for each living child, and a share which belongs to the children of the deceased child, to be enjoyed or divided equally between them. This is representation instead of proximity; *per stirpes instead of per capita*.

The rule of proximity would have excluded the children of the deceased child from any share of the property, for they are removed further from the stock of descent one degree, by the common law mode of computing degrees; and two degrees, according to the manner of computation adopted in the civil law.

But, in providing for the rule of representation in place of the rule of proximity, the law makers of the different States have not been uniform in the language used. In New York it is provided that lineal descendants of equal degree of consanguinity to the intestate, however remote, shall take in equal parts.

1 R. S. 751, § 2.

“If any of the children of such intestate be living, and any be dead, the inheritance shall descend to the children who are living, and to the descendants of such children as shall have died; so that each child, who shall be living, shall inherit such share as would have descended to him if all the children of the intestate, who shall have died leaving issue, had been living; and so that the descendants of each child who shall be dead shall inherit the share which their parent would have received if living.”

Id. § 3.

The next section applies the same rule to the more remote lineal descendants of the intestate, as follows :

“The rule of descent prescribed in the last section shall apply in every case where the descendants of the intestate, entitled to share the inheritance, shall be of unequal degrees of consanguinity to the intestate ; so that those who are in the nearest degree of consanguinity shall take the shares which would have descended to them, had all the descendants in the same degree of consanguinity, who shall have died leaving issue, been living ; and so that the issue of the descendants, who shall have died, shall respectively take the shares which their parents, if living, would have received.”

Id. § 4.

The same thing is declared in the statutes of Missouri, in fewer words, substantially as follows : That when all who are entitled to inherit are of equal degree of consanguinity to the intestate, they shall take *per capita* ; if of different degrees, they shall take *per stirpes*.

Similar language is used in Louisiana, in Georgia, in Indiana, in Texas and in Virginia. In other States the same result is secured by providing for descent to children and their descendants, by right of representation ; and to collateral kindred by the same rule.

The rule of representation seems to be applied to the lineal descendants of the intestate in all the States, as before remarked ; but it is not extended in all to the collateral kindred. In some of the States the order of representation embraces, among the collateral kindred, only the descendants of brothers and sisters. The order of succession, in the more remote relations of the collateral line, is governed by the rule of proximity or propinquity.

Among the States which have so limited representation are Alabama, Georgia, Illinois, Maine, Minnesota, Mississippi, and perhaps some others. Connecticut does not extend the rule to collateral relations at all. Only those in the nearest degree take at all. Pennsylvania extends the rule of repre-

sentation, by recent statute, to the grandchildren of brothers and sisters, and the children of uncles and aunts.

Most of the other States apply the rule to all the kindred.

5th. The fifth canon of the common law, providing that on failure of lineal descendants of the person last seised, the inheritance shall descend to his collateral relations, has been superseded in England, by giving the preference to lineal ancestors in certain degrees, and also to a certain extent in this country.

In New York, the estate descends to the father next after lineal descendants, and next to the mother, and then the collateral relatives are let in. In other words, the father and mother are interposed between the lineal descendants and the collateral relatives, in the order of succession. The rights of the father and mother are, however, subject to this qualification, that if the inheritance came to the intestate on the part of the mother, the father does not take, if the mother be living; but the estate descends to the mother for life, and the remainder to the brothers and sisters of the intestate and their descendants by representation, if there be any. If there be none, then the mother takes in fee. If the mother be dead, the estate goes to the father for life, and then to brothers and sisters of the intestate, and their representatives, if there be any. If none, to the father in fee.

1 R. S. 751.

In Arkansas, the father and mother are placed in the order of succession next to the descendants, with this qualification: that if the estate came from the father, and the intestate die without descendants, it shall go to the father and his heirs; if it came from the mother, then to her and her heirs. If the intestate otherwise acquired the estate, it goes to the father for life, the remainder to collateral kindred. If there be no father living, then to the mother for life, remainder to collateral kindred.

In California, when the intestate leaves no issue, and there is no surviving husband or wife, the estate goes to the

father. If there be a surviving husband or wife, the estate descends in equal shares to such survivor and the intestate's father.

Next in order are the brothers and sisters and the mother of the intestate, to share equally. In case of no brothers and sisters living, the mother has preference to the issue of the deceased brothers and sisters, and takes to their exclusion.

In Connecticut, the father and mother are third in order, and come in after the brothers and sisters of the intestate and their descendants.

The father and mother are also placed third in the order of succession in Delaware, the descendants and brothers and sisters occupying the first and second places successively; and the father is preferred to the mother, as in New York.

In Florida, the father is placed next to the descendants; while the mother is in the next order, sharing equally with the brothers and sisters, and their descendants.

There is a similar provision in Georgia, with an additional provision that if the mother has married again, she shall take no part of the estate of her deceased child, except when it shall have been her last or only child.

In Illinois, the parents are placed with the brothers and sisters of the intestate, and share equally with them, when there are no descendants.

In Indiana, the father and mother are let in next to the descendants, and take one-half as joint-tenants, while the other half goes to brothers and sisters, and their descendants.

In this State, also, the grandfather and grandmother are placed in the order of succession, in the absence of descendants, and of father and mother, and brothers and sisters, and their descendants.

There is a similar provision as to the parents in Louisiana as in Indiana.

In Maryland, the father and mother are preferred to brothers and sisters; the father holding precedence to the mother.

In Massachusetts, Rhode Island, New Hampshire and Oregon, the father is in the second order of succession, while

the mother is in the third, to share equally with the brothers and sisters.

In Mississippi descendants and brothers and sisters are preferred to the parents, leaving the latter in the third order.

In Missouri the father and mother are placed in the second order, along with brothers and sisters, and their descendants, and share equally with them.

In Michigan, Minnesota and Wisconsin, the father succeeds after the descendants, subject to the life estate of the widow, when there is one. The mother is not let in until the next order, and then to share equally with brothers and sisters.

In New Jersey the father is placed after the descendants, and after brothers and sisters, except when the estate came to the intestate on the part of the mother, when he is omitted from the line of succession, and the estate goes to the mother for life.

In North Carolina the father succeeds to the estate only in the absence of descendants, and of brothers and sisters, and their issue; and the mother comes after him.

In Ohio ancestral property descends to ancestors, next after brothers and sisters, or their representatives. Acquired property descends first to descendants, second to brothers and sisters, or their representatives, third to the father, and then to the mother.

In Pennsylvania the father and mother are placed next in order to the descendants, to take during their joint lives and the life of the survivor; the remainder to brothers and sisters, or their representatives; and for want of the latter, of the whole blood, the father and mother, or the survivor, take the fee.

In South Carolina the father, or if he be dead, the mother, takes one-half, where there are no descendants.

In Tennessee the parents succeed next in order to the descendants of the intestate; except as to estates acquired by the intestate, where brothers and sisters, and their descendants, are preferred.

In Texas the estate descends to the father and mother in equal portions, in case there are no descendants, and both are alive. If only one is alive, then one-half goes to the survivor, and the other to the brothers and sisters, and their descendants. If there be none of these, the whole estate goes to the surviving father or mother.

In Vermont, if the intestate leave neither issue nor widow, the whole estate descends to the father. The mother is not placed in the line of succession in any event.

6th. The sixth canon of the common law, preferring kindred of the whole blood to kindred of the half blood, is not the law of all the States. In some, the distinction is entirely abrogated, while in others, it is still observed in a qualified manner.

In Alabama, Arkansas, California, Illinois, Indiana, Iowa, Maine, Massachusetts, Michigan, Minnesota, New Hampshire, New York, North Carolina, Oregon, Rhode Island, Tennessee, Vermont and Wisconsin, there is no distinction made between the whole and the half blood. This should, however, be understood as subject to the qualification, that in some of the States here named, there are provisions in regard to ancestral estates, to the effect that heirs of the blood of the ancestor, from whom the estate originally descended, shall be preferred to those who are not of his blood. But this is not necessarily a preference of the whole to the half blood.

In Connecticut, Delaware, Florida, Georgia, Kentucky, Louisiana, Maryland, Mississippi, Missouri, New Jersey, Ohio, Pennsylvania, South Carolina, Texas and Virginia, kindred of the whole blood have, to some extent, a preference over kindred of the half blood.

In this country, there is no foundation for this distinction. It was adopted in the feudal law, in accordance with the idea that children of the whole blood were more nearly of the blood of the original lessee than children of the half blood; and were, therefore, more strictly in the true line of the parties called for by the terms of the feudal compact

Where commerce in land is free and common, as it is in this country, and especially where the tenure of every estate of inheritance is allodial, it is matter of no importance to keep in the line of succession from the original grantee.

7th. The seventh canon of the common law, which extends to collateral relations equally with lineal, and to lineal ascendants equally with lineal descendants, the policy of preferring males to females has not been entirely disused in this country. There is a single class of exceptions in favor of the feudal distinction, which prefers males to females, still carried out in practice in some of the States, namely: the lineal ascendants are subjected to the rule; the father is preferred to the mother in more than half of the States. There are only ten States wherein males have no preference over females, in that respect, namely: Connecticut, Illinois, Indiana, Iowa, Louisiana, Missouri, North Carolina, Pennsylvania, Tennessee and Texas. In the other States, the mothers and grandmothers are still made to feel, whenever the designated opportunity occurs, the preference which the feudal law gives to males over females in fixing the order of succession to estates of inheritance.

The laws of succession are so entirely regulated in this country, by arbitrary rules established by statute, that there would seem to be nothing which could require the construction of courts to determine the order of succession. But this has not been the result. The practical application of the rules and principles has led to disputes, which could be determined only by judicial construction.

The practical operation of that principle of the feudal law, which seeks to retain the succession in the direct line from the original lessee, is thus stated in Watkins on Descents, 147:

“If a person succeeds to an estate as heir to his mother, and dies without issue, his heirs on the part of his mother shall inherit such estate, and not his heirs on the part of his father; and, *e converso*, if it descends from his father it shall devolve, on the death of the son, to his heirs of the paternal line.

"But if a person takes an estate by purchase, he takes it *ut feudum antiquum*, and, consequently, *on the part of his father*, as of the worthiest blood; the law never calling in the heirs on the part of the mother to the inheritance of the son, unless such inheritance had actually descended from the mother, or until the blood of the father be exhausted."

See 2 Bl. Com. 222, 234; Litt. § 4; Co. Litt. 12.

This principle is sometimes characterized as the ancestral feature of the feudal law; and is found in the statutes of some of the States, as expounded by the courts in this country.

In New Hampshire the statute distributes the hereditaments of intestates: 1st, to children and their representatives; 2d, if there are no children, or their representatives, to the father; 3d, if none, to the mother and the brothers and sisters of the intestate, and their representatives; 4th, if none, to the next of kin equally.

R. S. ch. 166, § 1.

The second section of the same act provides: "If any person shall die under age and unmarried, his estate, derived by descent or devise from his father or mother, shall descend to his brothers and sisters, or their legal representatives, if any, to the exclusion of the other parent."

Whitten v. Davis, 18 N. H. 88.

That principle is borrowed in part from the feudal law, and seeks to keep the line of succession as near to the lineal descendants of the original grantee as possible.

It was said by the court in the case cited: "The property in this case was not derived by descent from the father, who never had any interest in it; nor are there any brothers or sisters of the intestate, or their legal representatives, to take it to the exclusion of the mother."

The point decided in that case was, that the mother of a minor dying unmarried, and leaving no father, brother or sister, is entitled to his estate which was derived by descent from his paternal grandfather, to the exclusion of the children of the grandfather.

The court further remarked: "Where an estate, whether testate or intestate, is settled, the surviving husband or wife, as the case may be, receives such share of it as the law prescribes, and the residue goes to the children, if any. If a minor child takes a share of such estate, and dies under age and unmarried, leaving a brother and sister, or the legal representatives of one, the second section of chapter 166 provides that the share so taken by such minor, or so much of it as remains, shall descend as if the minor had never taken it; that is, among the brothers and sisters, and their legal representatives, to the exclusion of the other parent who had already received his or her share of the estate from which the share was derived. In other words, such property is disposed of under those circumstances, as if the minor had died before the father or mother from whom it was derived."

In that case, there having been no brothers and sisters of the minor heir of the grandfather, there was no person left but the mother in the order of succession prescribed by statute, who was made the successor to the estate. As it resulted, therefore, it was a departure from the feudal principle, in that it changed the line of descent from the paternal side of the ancestry to the maternal.

In Rhode Island, it has been held that the estate that a daughter inherits from her mother does not, upon her death, go to her father, but to the other children.

Tillinghast v. Caggershall, 7 R. I. 333.

The question of succession was between the father and the sister, and the sister was held to be the successor, because she was the next of kin of the blood of the mother from whom the estate descended.

This decision was founded upon a provision of the statute, which declared in substance, that where an estate comes by descent, gift or devise, from the parent or other kindred of the intestate, and the intestate dies without children, the estate descends to the next of kin to the intestate, of the blood of the person from whom such estate descended.

R. S. 1857, ch. 159, §§ 1 to 6.

This provision of the statute, like all ancestral provisions, which seek to direct the order of succession in the future, in the same line that it has followed in the past, is strictly feudal in its character.

There is a similar provision in the statutes of Pennsylvania, which has received a similar construction. In *Mc Williams v. Ross*, 46 Penn. St. R. 369, the question was whether the mother of a daughter who had died intestate without issue and without brothers and sisters, should succeed to the estate of which the daughter died seised. Her nearest kindred, next to her mother, were a paternal aunt, and maternal uncles and aunts. The estate had descended to the daughter from her father.

It was decided that the paternal aunt was entitled to the estate, as being next of kin of the blood of the ancestor from whom the estate descended. The mother was incompetent to take, because, although nearest in blood to the intestate, she was wanting in the qualification that the estate neither came down from any one of her blood, nor was a new acquisition of the daughter.

Had the daughter been the original grantee of the State, or had she acquired it by purchase, her mother would have been entitled, because, in such case, she would have been a party to the contract, as the heir of the daughter, according to the strict feudal sense of a grant or lease in fee of land.

It has been decided also in Pennsylvania that "the common law principle of descents, that inheritable blood is only such as flows from the perquisitor of the estate, applies to cases of parental succession to the estates of deceased children, as well as to cases of strict descent from parent to child."

Robert's appeal, 89 Penn. St. R. 417.

In that case the intestate left a widow and a son. The widow was the mother of the son. The son died unmarried and without children. It was held that the mother did not succeed to the estate of the son, because she was not of the blood of the first purchaser. In other words, she was not included among the nominees of the contract.

In *Johnson v. Sybrook*, 16 Ind. 473, a father died intestate, leaving a widow and two daughters, the widow being the mother of the daughters. Then one of the daughters died, then the mother, and then the other daughter, all intestate, with no lineal descendants, no brothers or sisters or grandparents, but with uncles on both the paternal and maternal sides. The estate was held to go to the paternal line, to the exclusion of the maternal.

The court seems to have arrived at that conclusion in this way: Before the statute changed the common law rule the inheritance would have fallen to the paternal line, the wife then having only a life estate. The question then was, whether the statute which gave the wife one-third in fee, changed the ulterior result. In other words, whether, because she took an estate of inheritance, that divested the estate from the paternal line. The court held the change of the law, which gave her an estate of inheritance, did not change the rule that preferred the paternal line.

Under the statutes of Indiana, where an intestate left a child by a first marriage, and a child by a second marriage and his second wife, the widow took one-third of his estate in fee, and the other two-thirds passed to the two children equally. The second wife then died unmarried. The question was, whether her third of the estate descended to her child alone, or equally, to the child by the first wife. It was held to descend to her child alone. The final result to the children of the father, from whom the estate descended in the first instance, was, that the one took twice as much as the other.

Smith v. Smith, 23 Ind. 202; *McMakin v. Michaels*, id. 463.

In the last case cited, it was said by the court, that "those who were of the blood of the ancestor last seised could inherit." This ultimate inequality resulted from the fact that the second wife became the stock of descent of one-third of the estate on the decease of her husband. If she had taken only a dower right, as the law of dower exists in most of the States, the children would have inherited equally.

Where persons take estates, not from their immediate ancestors, but from more remote ancestors, by right of representation of the immediate ancestor, the question sometimes arises from which the estate is to be regarded as having been derived.

The question here stated was passed upon in *Sedgwick v. Minot*, 6 Allen, 171.

It was held to be the rule that, "if persons take an estate by inheritance from a more remote ancestor, by right of representation of a nearer ancestor, they cannot be regarded as taking by inheritance from the latter."

The children of A., who died before her mother, were held to take by representation through A. but as heirs, not of A. but heirs of her mother. The estate was regarded, in the law, as having descended directly from the grandmother to the grandchildren, and, therefore, free from any debts that might have existed against the mother, and also unaffected by any act of hers calculated to incumber or alienate the estate.

There has been some dispute as to the relative rights of kindred of the whole and of the half blood. That question was passed upon in New Hampshire, in *Clark v. Pickering*, 16 N. H. 284.

The question was, whether the words "surviving brothers and sisters," as used in the statute touching descents, included children of the half blood equally with children of the whole blood. The intestate was one of the children, an infant and unmarried. It appeared that the two sets of children had the same mother, but different fathers. The estate of the deceased child, derived from his father, was held to descend only to the brothers and sisters of the full blood with the intestate. The others, who had a different father, were excluded, because the estate had been derived from no ancestor of theirs.

According to that principle, had the estate descended from the mother, the respective rights of the two classes of children to the estate would have been equal. The result, there-

fore, was not so much due to the fact of the difference of blood as to the ancestral principle of the derivation of the estate.

In regard to remote kindred, cases sometimes have occurred, where the result was to be determined by the mode of computing degrees; whether the mode of the common law, or the mode of the civil law was to be applied. *McDowell v. Addams*, 45 Penn. St. R. 430, was a case of that class. The intestate in that case, left no kindred nearer than a grandmother on the one side and uncles and aunts on the other. The grandmother was held to take the property, on the ground that the proximity of the heirs was to be computed according to the manner of the civil law.

The question who, of several persons holding to the intestate different degrees of consanguinity, is to share in the inheritance, not unfrequently depends upon whether the principle of representation is applicable or not. *Johnson v. Chesson*, 6 Jones' Eq. R. 146, turned upon that question. The case involved only the distribution of personal property; and uncles and aunts were held entitled, to the exclusion of the children of a deceased uncle, on the ground that representation did not apply among collateral kindred, after brothers' and sisters' children. Among uncles and aunts, and more distant kindred, there was no representation in regard to personal property. The rule was said to be different as to real property, being applicable to kindred indefinitely.

In Pennsylvania, under the act of 1833, the nephews and nieces of an intestate deceased uncle were held to take *per capita*, and not *per stirpes*.

Miller's appeal, 40 Penn. St. R. 387

The intestate in that case left no issue, but left the children of three deceased brothers, as his heirs at law. One of the brothers left one child, one three children and one four. This inequality of the numbers in each family made the question important, whether they were to take *per stirpes* or *per capita*.

The court declared it to be the rule that, "where all the heirs are in equal degree of consanguinity to the decedent, they take *per capita*; when in different degrees *per stirpes*, or by representation."

The rule was changed by the act of 1855, so as to permit children of deceased uncles and aunts to take *per stirpes*, or by representation.

Robert's appeal, 39 Penn. St. R. 417.

CHAPTER IX.

ADVANCEMENTS; HOW CONSTITUTED; GENERAL CHARACTER AND EFFECT UPON THE RIGHTS OF HEIRS; HOW PROVED.

SECTION I.

ORIGIN OF ADVANCEMENTS.

SECTION II.

WHEN PROPERTY IS AN ADVANCEMENT; QUESTION GENERALLY CONSIDERED; QUESTION PARTICULARLY EXAMINED.

FIRST. NO MERE GIFT CAN BE TREATED AS AN ADVANCEMENT.

SECOND. MONEYS EXPENDED BY THE PARENT FOR THE MAINTENANCE, OR EDUCATION OF THE CHILD, ARE NOT REGARDED AS ADVANCEMENTS, EXCEPT WHERE THERE IS EXTRINSIC EVIDENCE THAT THEY WERE EXPENDED WITH AN INTENTION THAT THEY SHOULD BE ADVANCEMENTS.

THIRD. NO DELIVERY OR TRANSFER OF MONEY OR OTHER PROPERTY BY THE PARENT TO THE CHILD, WHICH LEAVES THE CHILD LEGALLY INDEBTED TO THE PARENT, SO THAT THE ONE COULD BE ADJUDGED TO PAY THE OTHER THEREFOR, IN ANY FORM OF ACTION, EITHER AT THE SUIT OF THE PARENT WHILE LIVING, OR AT THE SUIT OF HIS EXECUTORS OR ADMINISTRATORS AFTER HIS DECEASE, CAN BE REGARDED AND TREATED AS AN ADVANCEMENT.

SECTION III.

HOW AN ADVANCEMENT IS PROVED; THE DIFFERENT RULES APPLICABLE THERETO.

FIRST. A DEED FROM A PARENT TO A CHILD, IN CONSIDERATION OF LOVE AND AFFECTION, IS EVIDENCE OF AN ADVANCEMENT. WHEN THAT CONSIDERATION IS SO EXPRESSED IN THE DEED, THE DEED ITSELF IS PRESUMPTIVE EVIDENCE OF AN ADVANCEMENT. IF EXPRESSED TO HAVE BEEN MADE FOR A PECUNIARY CONSIDERATION, IT MAY BE SHOWN BY EXTRINSIC EVIDENCE, PAROL, OR OTHERWISE, THAT THERE WAS NO PECUNIARY CONSIDERATION; WHEN THE CONVEYANCE WILL BE PRESUMPTIVE EVIDENCE OF AN ADVANCEMENT, EXCEPT IN THOSE STATES WHICH HAVE PRESCRIBED A DIFFERENT RULE BY STATUTE.

SECOND. WHERE A PARENT PURCHASES LAND AND PAYS FOR IT, AND TAKES THE DEED OF CONVEYANCE IN THE NAME OF A CHILD, THE PRESUMPTION IS OF AN ADVANCEMENT TO THE CHILD; AND THAT PRESUMPTION IS CONCLUSIVE, UNLESS IT BE REPELLED BY OTHER EVIDENCE.

THIRD. HOW THE INTENTION TO MAKE AN ADVANCEMENT MAY BE PROVED BY AN ENTRY IN BOOK, OR OTHERWISE, BY THE PARENT.

FOURTH. WHEN PAROL TESTIMONY AND THE DECLARATIONS OF THE PARTIES, THE PARENT AND THE CHILD, ARE ADMISSIBLE TO EXPLAIN AND GIVE CHARACTER TO A TRANSFER OR BESTOWMENT OF PROPERTY, IN ORDER TO PROVE IT AN ADVANCEMENT.

SECTION IV.

INCIDENTAL POINTS CHARACTERIZING ADVANCEMENTS AND DISTINGUISHING THE RIGHTS OF THE PARTIES.

SECTION I.

ORIGIN OF ADVANCEMENTS.

The law of advancements was not originally a part of the common or feudal law; but has been an accretion thereto by particular customs and the force of the statutes of later times. The statute provision, which all the other statutes have to some extent patterned after, is contained in an act usually cited as 22 and 23 Charles II, chap. 10. It was passed in 1670, now just about two centuries ago. It was entitled "An act for the better settling of intestates' estates." The provision as to advancements was merely an incident, and not the chief purpose of the enactment; and it was only declaring that to be the general law of the kingdom, which had before existed by the force of custom in London and, perhaps, some of the other municipalities.

Carter v. Crawley, T. Raym'd R. 496; Co. Litt. 176 b, and notes 46-51; 2 Bl. Com. 515, 516; 2 Bacon's Abr. 252-254; *Quarles v. Quarles*, 4 Mass. 685; *Terry v. Dayton*, 31 Barb. 522; *Palmer v. Allicock*, 3 Mod. 58; *Elliott v. Collier*, 1 Ves. 15; *Fawkner v. Brown*, 1 Atk. 406; Customs of London concerning Orphans' and Freemen's estates, 2 Salk. 426.

The provision in the statute as to advancements was embraced in the fifth section of the act.

The fifth section provided for the distribution of surplusage, one-third to the wife and the rest to the children of the intestate, and their representatives, "other than such child or children (not being heir at law) who shall have any estate by the settlement of the intestate, or shall be advanced by

the intestate, in his life-time, by portion or portions equal to the share which shall by such distribution be allotted to the other children to whom such distribution is to be made; and in case any child, other than the heir at law, who shall have any estate by settlement from the said intestate, or shall be advanced by the said intestate in his life-time, by portion not equal to the share which will be due to the other children by such distribution as aforesaid; then so much of the surplusage of the estate of such intestate, to be distributed to such child or children as shall have any land by settlement from the intestate, or were advanced in the life-time of the intestate, as shall make the estate of all the said children to be equal as near as can be estimated. But the heir at law, notwithstanding any land that he shall have by descent or otherwise from the intestate, is to have an equal part in the distribution with the rest of the children, without any consideration of the value of the land which he hath by descent, or otherwise, from the intestate."

That provision was evidently adapted to primogeniture. "The heir at law," there expressly provided for, was intended for the oldest son. He was not to be abated in the personal property, because the law of succession, or of descents secured to him all the real property. In other words, the statute provision as to advancements was fashioned to so exempt the heir at law as to relieve him from bringing his part, both of the real and personal property, however great it might be, into hotchpot, for the benefit of other heirs and distributees.

It may facilitate the understanding of the provision in question, and of its practical operation, to study some of the earlier decisions of the courts in England, in the outset of our examination.

It will be found that advancements had no existence in the feudal law, but are innovations upon that system. They have, in some instances, been forced into the system by local customs, and thus have had, in one sense of the word, a common law origin. But generally, they are innovations made and established by statutes.

One of the first reported cases, wherein the English act referred to, received construction from the courts, was *Holt v. Frederick*, 2 P. Williams, 356. The facts of that case were these: Martha Frederick had been the wife of one Holt, and survived him, having as the issue of the marriage two sons and a daughter. She gave from her own estate one thousand pounds to the daughter, and died intestate, leaving her three children. The question was whether the daughter must bring her £1,000 into hotchpot, in order to be entitled to any further share of her mother's personal estate. It was held that it was not necessary to do so; that the sum could not be treated as an advancement, because the act of distribution did not apply to the mother, but only to the father.

In *Edwards v. Freeman*, 2 P. Williams, 435, a sum secured to a daughter by her father was treated as an advancement. The statute underwent a very elaborate discussion in that case; and the court said as to its origin: "The occasion of making this statute was, to put an end to the controversy betwixt the temporal and spiritual courts. The Ordinary before took bonds from the administrator to make distribution, and those bonds were at law adjudged void, and the administrator entitled to all the personal estate. *Hughes v. Hughes*, Carter's R. 125; 1 Levinz, 233. One died intestate leaving a considerable personal estate, and a son and a daughter; the son administered, and the daughter contended for a share, in the spiritual court, where it was thought an hardship that the son should have all, and yet the daughter was prohibited by law. However this statute of distribution takes away the administrator's pretensions (which he before had made with success) of retaining the whole. It is true, that in case any child had been advanced by a freehold, the spiritual court would not meddle with that; but the act of parliament has therefore gone further than ever the spiritual court intended to go, to make this freehold settled upon a younger child by the father, be brought into hotchpot."

It was held about the same time that, when a father advances one of his children in part, and the child dies leaving

issue, then the father dies intestate, the issue of the deceased child claiming a distributive share, must bring into hotchpot what their father received.

Proud v. Turner, 2 P. Williams, 560.

That was extending the doctrine of advancements beyond what the strict letter of the statute called for, and further than has been sometimes practiced under more modern statutes.

The doctrine of advancements is established by statute in most, if not all the States. By the Revised Statutes of New York, it is provided as follows: "If any child of an intestate shall have been advanced by him, by settlement or portion of real or personal estate, or of both of them, the value thereof shall be reckoned, for the purposes of this section only, as part of the real and personal estate of such intestate, descendible to his heirs, and to be distributed to his next of kin, according to law; and if such advancement be equal or superior to the amount of the share which such child would be entitled to receive, of the real and personal estate of the deceased, as above reckoned, then such child and his descendants shall be excluded from any share in the real and personal estate of the intestate."

1 R. S. 754, § 23.

Section twenty-four of the same statute provides: "But if such advancement be not equal to such share, such child and his descendants shall be entitled to receive so much only of the real estate of the intestate as shall be sufficient to make all the shares of the children to be equal, as near as can be estimated."

Section twenty-five provides: "The value of any real or personal estate so advanced, shall be deemed to be that, if any, which was acknowledged by the child by an instrument in writing; otherwise, such value shall be estimated, according to the worth of the property when given."

The statutes, upon this subject, of most, if not all the States, are substantially the same as in New York. Some

of the States have more particularly provided for the kind of evidence required to prove an advancement than others. But the general rules in that respect will be examined best by attending to the reported cases from the courts of the several States.

It has been decided that the statute provisions above set forth are substantially the same as were enacted in New York in 1787; and of the statute 22 and 23 Car. 2, chap. 10, as perpetuated by the act 1 Jac. 2, chap. 17.

1 Greenleaf's Laws, 863, § 8; 1 Revised Laws, 813, § 16;
Thompson v. Carmichael, 3 Sandf. chap. 127.

It is evident, however, that the views there expressed are not strictly accurate. The earlier statutes of New York, there referred to, were particularly limited to the distribution of personal property, and are embodied in the Revised Statutes, in other sections than those before quoted as to real estate, as follows: "If any child of such deceased person shall have been advanced by the deceased by settlement or portion of real or personal estate, the value thereof shall be reckoned with that part of the surplus of the personal estate which shall remain to be distributed among the children; and if such advancement be equal or superior to the amount which, according to the preceding rules, would be distributed to such child as his share of such surplus and advancement, then such child and his descendants shall be excluded from any share in the distribution of such surplus.

2 R. S. 97, § 76.

"§ 77. But if such advancement be not equal to such amount, such child, or his descendants, shall be entitled to receive so much only, as shall be sufficient to make all the shares of all the children, in such surplus and advancements to be equal as near as can be estimated.

"§ 78. The maintaining or educating, or the giving of money to a child, without a view to a portion or settlement in life, shall not be deemed an advancement, within the meaning of the two last sections; nor shall those sections

apply in any case where there shall be any real estate of the intestate to descend to his heirs.

“§ 79. The preceding provisions respecting the distribution of estates, shall not apply to the personal estates of married women; but their husbands may demand, recover and enjoy the same, as they are entitled by the rules of the common law.”

These sections are substantially a copy of sections sixteen and seventeen of 1 Revised Laws, 313, 314; and are there placed under the heading of distribution of assets. The sections first before given are a part of the chapter entitled “Of title to real property by descent.” The one class of provisions is expressly limited in application to personal property, the other to real estate. They seem to have been sometimes confounded in that respect.

The history of the statutes is more accurately stated in a later case, *Terry v. Dayton*, 31 Barb. 522. It is there said, of the law upon this subject as it existed before the Revised Statutes, that, “when primogeniture was abolished in this country after the revolution, although all the heirs at law took in the same manner as coparceners did at common law, there was no rule or provision for deducting advancements from the share of an heir in real estate. As to personal estate, the statute of distributions contained a provision similar to the English. See 1 R. L. 311, 313. But there was not such a provision in the statute of descents. Id. 52. If therefore a child had been advanced to any amount, and the father died leaving only real estate, the advancement was not taken into account. When the Revised Statutes were passed, the legislature introduced sections 23, 24, 25, 26 to remedy what they considered an injustice in this particular, and to provide for an accounting and adjustment of all advancements against the shares of the heirs at law in the real estate which descended to them. At the same time they retained the existing provisions in the statute of distributions. 2 R. S. §§ 76, 77, 78. These latter sections apply, as did the former and equivalent sections in the statute of

distribution, to personal estates only, although advancements of real estate are to be included."

There was a class of cases in England, where advancements were brought into hotchpot, in the apportionment of real estate, independently of any statute, and purely by the force of the common law. Littleton thus states this class of cases:

"Also, there is another partition, which is of another nature and of another form than any of the partitions aforesaid be. As, if a man seised of certain lands in fee simple hath issue two daughters, and the eldest is married, and the father giveth part of his lands to the husband with his daughter in frankmarriage, and dieth seised of the remnant, the which remnant is of greater yearly value than the lands given in frankmarriage. In this case, neither the husband nor the wife shall have anything for their purpartie of the said remnant, unless they will put their lands given in frankmarriage in hotchpot, with the remnant of the land, with her sister. And if they will not do so, then the youngest may hold and occupy the same remnant, and take the profits only to herself."

The author then explains the word "hotchpot," as, "in English, a pudding," and further says: "For in this pudding is not commonly put one thing alone, but one thing with other things, and, therefore, it behooveth in this case to put the lands given in frankmarriage with the other lands in hotchpot, if the husband and wife will have any part in the other lands." Litt. §§ 266, 267.

Lord Coke, in his note to section 266, puts this question: "Admit that the lands given in frankmarriage are of greater value than the lands descended in fee simple, shall the other sister have any remedy against the donees?" He then answers the question as follows: "It is plain she shall not, because it is lawful for a man to dispose of his own lands at his will and pleasure."

To section 267 he says: "This gift in frankmarriage shall *prima facie* be intended a sufficient advancement; and, therefore, the remnant shall descend to the other coparcener,

only with this provision in law *tacite* annexed, that if the donees will put the land into hotchpot, then she shall out of the remnant make up her part equal. But the donees must do the first act, and, in the mean time, the whole fee simple land descends to the other."

In section 269, the author explains the reason and operation of hotchpot in this way. He says: "When a man giveth lands or tenements in frankmarriage with his daughter, or with his other cousin, it is intended by the law that such gift made by this word frankmarriage is an advancement, and for advancement of his daughter, or of his cousin, and namely, when the donor and his heirs shall have no rent nor service of them, but fealtie until the fourth degree be past. And for this cause the law is, that she shall have nothing of the other lands or tenements descended to the other parcener, unless she will put the lands given in frankmarriage in hotchpot, as is said. And if she will not put the lands given in frankmarriage in hotchpot, then she shall have nothing of the remnant, because it shall be intended by the law that she is sufficiently advanced, to which advancement she agreeth and holds herself content."

He then states the rule to be, that the heirs of the donee of the frankmarriage are subject to the same law as the donee; and that, in order for either the donee or her heirs to come within the rule of hotchpot, the donation and the estate inherited must come from the same party. Lands descending from any other person than the donor are taken the same as though there was no donation in frankmarriage. §§ 270, 272.

This rule, requiring lands to be put in hotchpot, applied to lands given in frankmarriage, and to no other donations of land. And the rule did not apply, except to lands in fee simple. §§ 274, 275.

2 Bl. Com. 100, 101.

It is evident that the rule which brought donations of land into hotchpot, in dividing the real estate of an intestate

among his daughters, who might take as coparceners, was a common law rule; and that in no other class of cases could the heir be abated in the real estate he might take by descent, by any requisition on account of advancements, either by the common law or the statutes of England.

This was so declared in *Laro v. Smith*, 2 R. I 244, where it is said by the court, that, "as a common law proceeding; it was only known in England in partition between sisters, coparceners, one of whom had received gifts of estates in frankmarriage. In such case, if land descends from the same ancestor to her and her sisters in fee simple, she shall have no share of them, unless she will agree to divide the lands so given in frankmarriage with the rest of the lands descending."

That case was a bill in equity for the partition of lands.

The statute, 22 and 23 Car. 2, chap. 10, in its provisions touching advancements, did not provide that the heir should suffer abatement in the land which came to him by descent from the intestate, by reason of any advancement which he might have received. Indeed, the whole statute related to the distribution of the personal property of intestates and not to the descent of the real property.

Toller on Executors, 378; Com. Dig. Admin. H.; 4 Burn. Eccl. L. 344; *Edwards v. Freeman*, 2 P. Williams, 443.

In *Cleaver v. Spurling*, 2 P. Williams, 526, it was held that if a freeman of London, having but one child, advances that child in part only, the child shall take a full share without bringing what she had before received into hotchpot; for the only meaning of bringing the child's share into hotchpot is to make an equality among the children.

If a freeman has several children, or but one child, and has in his life-time fully advanced that one child, or all his children, it is the same as if there was no child, and the freeman may dispose of his estate as if there was none; so if a freeman compounds with his wife before marriage for her customary part, it is the same as if there was no wife.

The law relating to the subject of advancements is, as before remarked, of modern growth, compared to the feudal law, so far as it embraces the question of descents. It was not only no part of the feudal law, but was wholly inconsistent with it. Where lands descend only to the oldest son, there is of course no way of applying the doctrine of advancements to the real estate. Being comparatively of modern growth and only occasionally applicable to existing facts, its rules and principles have not been fully reduced to system. There is probably no branch of the law which has received so little attention from the text-writers, as that of advancements in connection with the descent of real estate. Certainly, there is none so much and so generally developed in the reported decisions of the courts, which has received so little attention from the elementary writers.

One thing may be here remarked, that the English statute of distributions made property received by children, both real and personal, liable to be brought into collation or hotchpot. But this only affected the distribution of the personal property, and did not abate the quantity of lands which any child might inherit. Such was the effect of the statutes in New York until the Revised Statutes of 1830. A similar remark may apply to some of the other States.

In seeking for rules of construction of the statute provisions of the several States, and for the adjustment of the relative rights of heirs in cases where they have received donations or assistance in different amounts and under different circumstances, there is a wide field for examination, namely, the cases decided in the English courts, and in the courts of the several States of this country. In this country, cases of that class are numerous, and embrace facts and circumstances of almost every conceivable variety.

There are certain rules and principles in regard to this subject which are generally concurred in by all the authorities; while as to others, there are differences of opinion.

The intention of the party making the gift or furnishing the money or conveying the property, must determine

whether it is or is not an advancement. That is a principle universally adopted. It stands out prominently in all the cases. So far there is no room for discussion or doubt.

It should be understood also, that that is a principle so comprehensive and general as to embrace the whole subject. There are other rules, but they are all subordinate and auxiliary to that principle. They are established and applied either to determine when property is to be treated as an advancement, or to determine how the point is to be proved.

SECTION II.

WHEN PROPERTY IS AN ADVANCEMENT.

Some things in regard to this question are settled by statute in New-York. It is provided, that "the maintaining or educating, or the giving of money to a child, without a view to a portion or settlement in life, shall not be deemed an advancement."

1 R. S. 754, § 26.

Whether a similar provision is to be found in the statutes of other States or not, is unimportant; for that is the undoubted rule of the established law. It is a rule applied in one of the earliest cases under the English act, the case of *Edwards v. Freeman*, 2 P. Williams, 435, before cited. In that case, a part of the money in question, £80 *per annum*, which was settled on the daughters, "to raise maintenances for such daughters till their portions should become payable," was held by the court not to be an advancement. The opinion as reported embraces the point of education. It is said, "but as to the maintenance money, £80 a year, secured by the father to the plaintiff, the daughter, we are of opinion this is not to be brought into hotchpot, no more than what is allowed or secured by the parent for the education of the child."

Page 449.

This doctrine was applied in the case of *Vail v. Vail*, 10 Barb. 69, to provisions made by will for the maintenance and

education of children, where the money was appropriated by the executors after the testator's death. The testator had directed in his will that his executors should appropriate and pay from the income of his estate such sums as might be necessary for the support and education of his minor children, until each should become of age or marry. He further directed payments to his daughters in the sum of \$25,000 each as they became twenty-five years of age; and to his son \$75,000, in sums of \$25,000, at three different periods of time. He also made provision for a residuary distribution among his children, in such proportions as to equalize, with interest, the previous *advances* which should have been made by his executors to them, so as to give each an equal benefit from his estate. A decree was made at special term allotting to each legatee his part. Objection was made to the decree, that the children were not charged with the sums applied for their support during their minority; and it was contended that the intention of the will was, that such sums were intended by the testator to be embraced in the term "previous advances." The term "advances" was assumed to be used in the will to mean the same as when used in the statutes in regard to intestates' estates. The court decided that the sums expended for the support of the children during minority were not "advances."

The argument of the court discloses the principle upon which such a question should turn. It is said, in the opinion: "It is the legal duty of a father to support his children during their infancy, according to his ability; and although the legal obligation is not continued upon his estate after his death, yet every parent recognizes the moral obligation; and so natural is the feeling, that in any ambiguous case it may be presumed that the parent was acting under its influence."

"Thus the provision for maintenance is regarded not as a mere gift, but as a duty — a duty which it is unnatural to omit."

A good definition is given of the term "advancement" in *Osgood v. Breed's Heirs*, 17 Mass. 358, as follows: "The

true notion of an advancement is a giving, by anticipation, the whole, or a part of what it is supposed a child will be entitled to on the death of the parent or party making the advancement."

In *Christy's Appeal*, 1 Grant's Cases, 369, an advancement is described as an irrevocable gift by a parent who afterwards dies intestate, of the whole or a part of what it is supposed the child will be entitled to on the death of the party making the advancement.

In the same State, in *Miller's Appeal*, 31 Penn. St. R. 337, an advancement is declared to be a pure and irrevocable gift by a parent in his life-time to his child, on account of such child's share of the estate after the parent's decease.

In *Gray v. Gray*, 22 Ala. 233, an advancement is defined as a provision made by a parent to his child, of money or property, the entire interest in which passes out of the former in his life-time, though it is not necessary in all cases that it should take effect in possession before death.

In *Crosby v. Covington*, 24 Miss. 619, it is also held, that to constitute an advancement the ancestor in his life-time must divest himself of all interest in the property.

In *Cawthorn v. Coppedge*, 1 Swan, 487, an advancement is held to be a gift by a parent to his child, by anticipation, in whole or in part, of what it is supposed the child will be entitled to on the death of the parent.

Similar definitions have been given in other cases.

Chancellor Kent says: "There is, generally, in the statute laws of the several States, a provision relative to real and personal estates, similar to that which exists in the English statutes of distribution, concerning an advancement to a child. If any child of the intestate has been advanced by him by settlement, either out of the real or personal estate, or both, equal or superior to the amount in value of the share of such child, which would be due from the real and personal estate if no such advancement had been made, then such child, and his descendants, are excluded from any share in the real or personal estate of the intestate. But if such

advancement be not equal, then the child and his descendants are entitled to receive, from the real and personal estate, sufficient to make up the deficiency, and no more. The maintenance and education of a child, or the gift of money, without a view to a portion, or settlement in life, is not deemed an advancement."

4 Kent, 417, 418.

These remarks apply to the States generally.

These definitions present a good general idea of the character of an advancement. But they are subject to this criticism. They regard the transaction as one purely of gift by the parent. We shall see, before we close the examination of the reported cases, that it is not a gift in the legal acceptance of that term. Or, if there is a gift, there is a qualification connected with it, which gives to it the character of a contract. It is something more than a gift. The donation must be understood as accompanied with the proposition that its acceptance puts the accepting party under obligations to account for the thing bestowed, on the death intestate of the donor; and to allow the amount to be deducted from whatever share of the intestate's property the law may apportion to the donee. Strictly regarded, there must be a proposition by the parent on the one side, and an acceptance by the child on the other. The proposition must be, that the parent shall transfer his right and title to certain property, in consideration that the child shall agree to relinquish his right and title to an equal amount of the parent's property, in case the latter shall die intestate leaving other heirs at law. Such a proposition made, accepted and carried into effect, constitutes what the law regards as an advancement; and the result is the same in real as in personal property, wherever the statutes have, as in New York, applied the doctrine of advancements to both kinds of property, or wherever the courts have so construed the statutes.

The transaction, when viewed in connection with estates of inheritance in land, exhibits more clearly the character of a

contract. It should be borne in mind, that an estate of inheritance, as before shown, is the result of a contract. The State makes a grant of land to the grantee and his heirs. That constitutes an estate of inheritance in the land in any party who may be the party of the second part to the contract, while he remains such party. The parent, being such party, proposes to one of his children to assign to him his contract right in a part of the land, or to bestow other property, on condition that the child shall relinquish to other children his right to the rest of the land, to an amount equivalent to the amount bestowed, whenever the parent shall die intestate; and the child accepts.

The operation is simply this: On the death of the parent intestate, the children succeed to these grants in fee of the State equally, as the nominees next in order named in the contracts of the State. Then, the children who have had no advancements may interpose against the child who has had his advancement contract with the parent, and insist that his share shall be abated to the amount of the advancement. That was the contract between the parent and child, and the law respects and enforces it. It may be open to proof by a written agreement between the parent and child, or left to implication from attending facts and circumstances. However proved, the contract is the same, and the law respects it. The mode of proof does not change the character of the contract, nor diminish the respect due to it in the law.

In vindication of the foregoing propositions touching the law of advancements, the whole current of authorities will be found to bear witness. They leave no room for doubt upon three points: *First*. That no mere gift is regarded in the law as an advancement. *Second*. That moneys expended by the parent for the maintenance or education of the child will not be treated as advancements; and *Third*. That no delivery or transfer of money or property by the parent to the child, which leaves the latter legally indebted to the parent, so that he could be adjudged to pay therefor, in any form of action, either at the suit of the parent while living,

or at the suit of his executors or administrators after his decease, can be regarded and treated as an advancement. These three propositions being established, it necessarily follows, as the current of authorities will be found to show, that any transfer of money or property from the parent to the child, must, in order to become an advancement, be one which is to be accounted for by the child only on the decease of the parent intestate, leaving other heirs at law, and to be paid or returned only by deducting the amount from that part of the property of the intestate which the law would otherwise give to the child.

This general view of an advancement is fully sustained by the reported decisions of this country. It is said by the court in *Weatherhead v. Field*, 26 Verm. 668 :

“The true idea of an advancement is a delivery by the parent during his life to one or more of his children, of the whole or a portion of that to which the child would be entitled, on a distribution of the estate after the parent's decease. It is distinguishable from a gift which parents may make to their children, whether to a greater or less amount; for in such case there is no intention to have it chargeable on the child's share of the estate. It is also to be distinguished from a debt; for in the case of an advancement the common relation of debtor and creditor does not exist.”

A similar view of what is the character and effect of an advancement, was expressed by the court, in declaring what were the rights of the child under such an arrangement, in *Phillips v. McLaughlin*, 26 Miss. 514.

It was said: “But he may be satisfied with what he has already received, and not claim any further interest in the estate. If so, he has a right to retain the property given him by the deceased, which became absolutely his property, so far as the deceased could give it to him, subject only to the condition that if he should claim his distributive share of the general estate, he should submit, what he had received, into the general mass, and take his proper portion of the whole estate. Until he thinks proper to make such claim, the

right and title of the deceased to the property is absolutely vested in him."

It is evident that the rights of the party receiving an advancement, in this country, do not differ in any material respect from the rights so secured in the case of the gift of land in frankmarriage, as described by Littleton. The difference consists chiefly in terms and phraseologies and the position of parties. The character of the transaction is, in the principles involved, and in the ultimate results, intended to be substantially the same.

Dugan v. Gettings, in the Maryland Court of Appeals, 3 Gill's R. 138, is a case where the court gave to an advancement the character of a contract and enforced it as such. The facts were, in regard to the question of advancement, substantially as follows: A father gave, verbally, to a daughter a house and lot in fee as a marriage portion. The daughter was placed in possession of it by her father as her own property. The arrangements were made known to the intended husband before the marriage. She continued to enjoy the property for seven or eight years, and until her death. The father had, during the time, repeatedly declared that it was intended as an advancement for her, and was made in contemplation of her intended marriage. After the decease of both father and daughter, the children of the daughter filed their bill, praying, among other things, that the executors should be decreed to convey the premises to the heirs at law of the daughter.

It was held that the agreement made by the father with his daughter, in contemplation of her marriage, by way of advancement, and carried into effect by her marriage and giving her the possession, constituted an agreement which the father could not revoke and which a court of equity would enforce.

In New Hampshire, in *Nesmith v. Dinsmore*, 17 N. H. 515, a contract by a child with the father, to accept a certain sum in full of all claim on his estate, was held valid and binding against the child after the decease of the father

intestate. The proceeding or action was brought for the partition of certain lands, by one of the heirs. The contract of release was held good against the child who gave it.

An advancement was held valid, as a contract in favor of the other heirs, in the case of *Notley Young's Estate*, 3 Md. Ch. Decisions, 461.

In that case, lands were conveyed to a daughter by her father, as an advancement, in his life-time. After his death intestate, she was appointed administratrix, and executed a deed upon the land to her bondsman as security for the purpose of indemnifying him.

It was held, that "the right which the heirs have, that the estate advanced should be brought into hotchpot, is a legal right, and that no alienation or incumbrance placed by the heir advanced, upon the property given by way of advancement, can defeat that right."

FIRST. NO MERE GIFT CAN BE TREATED AS AN ADVANCEMENT.

There are other cases beside those before cited which sustain this proposition. In *Sherwood v. Smith*, 23 Conn. 516, the only question submitted to the court on appeal was, whether the father, having made to his son an absolute gift of a sum of money, could afterwards convert the gift into an advancement, without the knowledge or consent of the son, so as to deprive him or his heirs of their full distributive share. It was held, that the gift could not be thus changed into an advancement.

This case is an example, to show that advancements are matters of contract, and subject to proof, in some respects, like other contracts.

The intestate, Jeremiah Sherwood, left three children, a son, Gershom Sherwood, and two daughters. In 1824, he conveyed to his son certain real estate, of the value of \$1,100, and charged the same to him as so much advanced toward his portion. His two daughters afterwards married, and he advanced to each of them \$323. In 1844, the son requested his father to erase the charge of \$1,100 against him, and the

father complied with his request and made the erasure, with "the mutual understanding, that the donation to the son should be converted into an absolute gift, and that no charge for any advancement should be made against either of the children."

Four years after this arrangement the son died, leaving two sons his heirs at law. The father of the son, the grandfather of the two sons who were appellants, died in 1844, leaving the two grandsons, the appellants, and his two daughters his heirs at law.

After the intestate, Jeremiah Sherwood, had erased the charge against his son, he made entries upon his book as follows:

"Gershom Sherwood, 1824. To eleven hundred dollars toward your portion.

"Pamelia Sherwood, 1825. To three hundred and twenty-three dollars toward your portion.

"Delia Sherwood, 1830. To three hundred and twenty-three dollars toward your portion."

It did not appear that the parties, here charged, had any knowledge of those entries.

The book containing these charges was offered in evidence before the court of probate, and that court ordered that the heirs of the deceased should be charged with advancements as specified in the entries.

The grandsons appealed from that order, and the two daughters and their husbands were made defendants.

The Superior Court reserved for the advice of the Supreme Court the following questions, viz.:

1. "Could the said Jeremiah, after the erasure of the first charge upon his book, in the manner stated, without the knowledge or consent of his son, convert the donation from an absolute gift into an advancement, so as to deprive the appellants, his heirs at law, of their full distributive shares?

2. "If he could not, what decree ought to be made that justice may be done to the parties?"

The answer to the first of these questions is thus stated in the opinion of the court *per* Waite, C. J.

"If Jeremiah Sherwood had conveyed the property to his son as an absolute gift, he could not afterward, without the consent of his son, convert that gift into an advancement, although at the time of the transfer it was competent for him to give it either character as he pleased. The right to charge, as an advancement, must exist at the time of the conveyance.

"Nor could he deprive his son of a full distributive share of his estate, upon his dying intestate, by merely charging him with a sum as an advancement, without the transfer of any property. For, although it was competent for him to direct in what manner his property should be distributed after his decease, yet he could not do it only by will, executed in the manner required by law, and not by a simple entry on his book."

The court then say, in conclusion of the argument upon the first question, as follows :

"Although the property, in the present case, was originally given and charged to the son as an advancement, yet, by their subsequent arrangement, that conveyance was converted into an absolute gift, and from that time stands in the same situation as if it had originally been so given. And, in our opinion, it was no more in the power of the father, by his single act, to change the character of the conveyance than to rescind it."

We have quoted more fully from this case than from some others, because it shows conclusively that an advancement, as regarded in the law, is a matter of contract arrangement of a peculiar character. It is not left to the arbitrary disposal of the ancestor, but requires the assent of the heir. It is a matter of compact between the heir and the ancestor. There is a tendency to regard it otherwise, growing out of the fact that the ancestor may dispose of his property by will as he pleases, without consulting his heirs or devisees. He has in that way an arbitrary power of disposition. But when he

makes no will, and leaves his property to descend or be distributed to his heirs and among his next of kin, as the law prescribes and directs, neither the descent nor distribution can be made otherwise than as the statute prescribes, unless it is proved that there has been advancements made to some more than to others, before his death; and those advancements must be proved to have been made by the ancestor and to have been accepted by the heir, not as absolute gifts, not as loans, but as so much that the heir receives on account of the portion which would be his on the death of the ancestor; and which he is to account for on the distribution of the estate.

The ancestor can dispose of his property as he pleases by will. He can give, while living, to his children as he pleases. He can make advancements as he pleases, if his children choose to accept. But the point of the decision is, that having once made an absolute gift, he cannot afterwards change it to an advancement without the assent of the heirs to whom it was given. It is not for the ancestor to change the character of his acts by writing in his book or elsewhere, unless he has the assent of the heir.

In answer to the second question, the court held that the whole decree should be reversed, in favor of the daughters who did not appeal, as well as in favor of the grandsons who did appeal.

The same doctrines had been very distinctly held and applied in Connecticut, before that decision was made, in *Johnson v. Balden*, 20 Conn. 322. The case there also came before the appellate court from a decree of the court of probate, made in the settlement of the estate of an intestate.

There were, in that case, two separate questions of advancement, in each of which the point to be decided was, whether the property which passed from the father to the child was a gift or an advancement. The one question involved the rights of a daughter, and the other of a son.

The daughter had received from her father, at the time of her marriage, articles of household furniture to the amount

of \$538.51. At the time of the delivery of the articles, the intestate entered them in his account book "as articles furnished for his daughter, Cornelia." At the same time, he told the husband he did not enter the articles for the purpose of making a charge; and, some time before his death, he expunged the entry from his book. The son had received \$1,100 to establish him in business. No entry in book was made, and no receipt, or other written evidence was ever had by the father. It was proved that the intestate at one time said to a friend, that whatever his son had had of him was a free gift, and was not to be reckoned in the settlement of his estate. The court of probate had decreed that the articles furnished to the daughter were not an advancement; but that the money received by the son was an advancement. The court on appeal affirmed the decree below as to the daughter, but reversed the decree as to the son, holding that there was no advancement in either case.

The question of advancements and the incidental rules connected therewith are fully and clearly discussed in the opinion of the court.

Upon the particular case before them and their decision thereupon, the court said:

"The existence of the relationship of parent and child does not furnish sufficient ground to decide that the delivery of a chattel or the advancement of money, by the one to the other, was intended as a child's portion. Unexplained, this might as well be treated as a debt or a gift, as an advancement, as if it had been between other persons. A parent may be generous and liberal to his child, without placing him under future accountability, either to himself or to his estate; and he may discriminate in his favor, between his children, if he pleases. The law, to be sure, supposes, in ordinary cases of family arrangement, that equality is equity; but no person, so well as a parent, knows how such equality and such equity can best be effected and promoted among children. In many families, a judicious discrimination is equity.

"Some have supposed, that, in the case of *Clark v. Warner*, 6 Conn. 356, this court intended to say, that every considerable gift from a parent to a child must be treated as an advanced portion, and be brought into hotchpot. We do not believe this was meant; and we do not recognize such a principle.

"Where personal chattels are delivered by a parent to a child, or moneys are advanced to him, or for him, we think there should be satisfactory evidence besides the mere delivery or advancement, to constitute them chargeable advancements or part portion. There must be evidence of such an intention beyond the unexplained act. And in such cases, the acts and declarations of the parent, either concurrent or subsequent, may be shown as evidence, as well of his original intention as of his final purpose. And so we suppose the court, in the case of *Clark v. Warner*, intended by saying, 'Had the deceased explicitly declared, that they were not to be deemed advancements or part portion, the case might have been different;' referring here, as they do, to a subsequent declaration."

In *Mitchell v. Mitchell*, 8 Ala. (N. S.) 414, it was held to be a general rule that a donation of property by a parent to a child was *prima facie* an advancement, under the statutes of that State, and must be brought into hotchpot. But it was further held, that it might be shown to be intended as a gift.

There was, in that case, a deed of conveyance of land in fee, by the father to two of his children, accompanied with his declaration, that the conveyance was not intended as an advancement, but as a gift, "in addition to their equal share." That was held to be a gift and not an advancement.

So in *Autrey v. Autrey's Admr.*, 37 Ala. 614, it was held that money had by a child from his father was presumptively an advancement; but that that presumption was liable to be rebutted by evidence that it was intended as an absolute gift, and that the contemporaneous declarations of the parent were admissible to fix its character.

In *Merril v. Rhodes*, 37 Ala. 449, the same general rule was held, that donations of property from father to child are presumed to be advancements, unless the contrary appears.

In that case the intestate had made deeds of lands to his sons, expressed in the deed to be "for and in consideration of natural love and affection and one dollar." But it was in evidence that the intestate had said, at the time of making the deeds, that he meant that his sons should have so much more than his daughters; and that he made the deeds as absolute gifts and not as advancements. The parol declarations were held to control the character of the deeds, and to prove them to be absolute gifts.

The decision in *Cecil v. Cecil*, 20 Md. 153, turned upon a question of evidence. The petition of the parties on the one side alleged that the parties on the other had received from the deceased father, in his life-time, certain money and property; that the receipts were had by way of advancements; and that the amount should be brought into hotchpot before the distributive share in the personal estate of the father should be assigned. Two of the parties admitted the receipt of the money; and the only question for the court to decide was, whether the money and property were bestowed as an absolute gift or by way of advancement.

The evidence is not set forth in the reported case, but the court decided that there was no advancement, and assigned the grounds of the decision as follows: "In looking then to the intention of the donor in this case, as deduced from the evidence, we think it clear that the property and money bestowed upon the appellees, Mrs. Harrington and Mrs. Hooper, was an absolute gift and not an advancement."

In *Dillman v. Cox*, 23 Ind. 440, the point to be decided was, whether certain personal property furnished by the parent to his children was an absolute gift or an advancement.

The testimony showed that the ancestor, in his life-time, had given to each of his children, by his first wife, choses in action and other personal property to the aggregate value of

\$625 dollars each ; that he intended it as a gift, in consideration that they had assisted him in accumulating his property ; and that he intended that these children should have this much more than his children by the second wife. The court pronounced it a gift, and not an advancement.

The question in this case arose in an action for the partition of real estate.

A similar question was decided in *Lawson's Appeal*, 23 Penn. St. R. 85. In that case, the father, who had accumulated considerable property in the lumber business, retired from the business. He had five children. He gave to each of his two sons the one-fifth of his property ; and in addition thereto, surrendered to them the use of his lumber-yard and his business, declaring that he had presented the business to his boys, and made no charge.

This surrender of the business and the lumber-yard was held to be a gift and not an advancement.

It was said by the court : " We think the sound conclusion is, that he meant a gift rather than an advancement ; and the character impressed then must remain. That which was a gift at first cannot become an advancement, no more than an advancement can become a gift." This decision fully accords with the Connecticut cases before cited.

There is a distinction taken in *Ison v. Ison*, 5 Rich. Eq. R. 15, between the bestowing by the father to the children of things merely for pleasure to the children, and things to be used by them for profit. Things of the former class are construed as merely gifts, while those of the latter are considered as advancements. That is the rule when there is no extrinsic evidence to show a contrary intention on the part of the father. In that case, the child had been presented with a stallion, to be used as a foal-getter, for profit ; and the court held, it was an advancement. At the same time it was said, if the present had been of a saddle horse, it would have been held as a gift, in case it appeared to have been bestowed for the purpose of pleasure. The grounds of the decision were, that, in the one case, there was evidence of an intention of

an advancement, because it came within the idea of bestowing upon the son, "in anticipation of what he might inherit," or, "with a view to a settlement in life;" and, in the other case, there would have been an absence of evidence of any such intention.

In *Murrel v. Murrel*, 2 Strobb. 148, the chief question was, whether certain lands conveyed by the father to his two oldest sons were to be treated as advancements in the final distribution of his estate, he having died intestate. The testimony was, that the sons were the oldest of the children. That the father was poor, and his other children young. That these boys worked liked negroes, and gave him a start in the world, and that he repeatedly expressed an intention to give them each a tract of land, beyond a child's share, in remuneration of their faithful and valuable services; and that after he conveyed the lands, he declared he had fulfilled the intention he had expressed.

It also appeared, that, during the time the services were being rendered, the father held out promises of remuneration to his sons for their extraordinary exertions, to be realized in the distribution of his estate. The chancellor held that the lands conveyed were not to be treated as advancements, and, on appeal to the Court of Appeals, his decision was affirmed.

It was said, "that though a parent is entitled to the services of his children while under age, he may waive his right and may make the services of his children the consideration of a contract or promise, and that he may give property *bona fide* in the performance of such obligation of justice, without its being subject to a claim on the part of the other children to consider it in the light of an advancement. They were not advanced by these conveyances, although the lands were given to them by their father."

It is evident, from the whole range of the authorities, that the declaration of the New York statute, before set forth, that "the giving of money to a child, without a view to a portion or settlement in life, shall not be deemed an advancement" is declaratory of the well-settled rule of this country.

There may be some doubt whether the rule settled by the decisions of the courts in Alabama, that a donation from a parent to a child is always *prima facie* evidence of an advancement, until the contrary be shown by some contemporaneous or accompanying evidence, is the rule of the States generally. But there is no doubt of the general rule that the intention of the donor controls the character of the donation in that respect. There is some difference in the mode of proving that intention, in the practice of the different States, as we shall show before we leave the subject.

SECOND. MONEYS EXPENDED BY THE PARENT FOR THE MAINTENANCE OR EDUCATION OF THE CHILD ARE NOT REGARDED AS ADVANCEMENTS, EXCEPT WHEN THERE IS EVIDENCE THAT THEY WERE EXPENDED WITH INTENTION THAT THEY SHOULD BE ADVANCEMENTS.

We have before shown, that the rule in this respect is declared by statute in New York. Money expended for maintenance and education, "without a view to a portion or settlement in life, shall not be deemed an advancement," according to the statute provisions.

1 R. S. 754, § 26; 2 id. 98, § 78.

Regarded in the light of principle and propriety, that is the true rule. The parent is morally, socially and legally bound to support and educate his children. Consequently, the fact that he has done so raises no presumption of any other intention than the intention of discharging that duty. It falls short, in ordinary cases, of raising a presumption that he thereby intended to make an advancement.

In *Vail v. Vail*, 10 Barb. 72, it was remarked, in the opinion of the court, that "the exclusion was made to comply with the general sense of what was proper, and because money so expended was not deemed an advancement, nor incompatible with the object expressed, 'of making all the shares of the children equal, as near as can be.'"

That seems to be the rule generally of all the States. It was so declared in *Riddle's Estate*, 19 Penn. St. R. 431. It was, in that case, held, that money expended by the parent in the education of his child was not an advancement, unless the intention to make it an advancement expressly appeared.

In that case, the father had kept an account of expenditures for the clothing, board and tuition of his son, to an amount, in the aggregate, of \$700; which, from all the evidence in the case, the court pronounced to be an advancement. It was so held, because the intention that the money expended should be an advancement was shown by the circumstances and facts of the case.

There is a case in Alabama, *Mitchell v. Mitchell*, 8 Ala. (N. S.), 414, where expenditures of a like character were decided not to be advancements. The doctrine was proclaimed, that moneys expended for the education of children could not be treated as advancements, and should not be equalized between them in the final distribution of their father's estate.

The father, in that case, kept an account with his son, the first item of which was one of \$920, for his expenses at college. After footing up the several items, there was added, in the handwriting of the father, as follows: "Accounted for as so much that he has had of my estate; if it is over his portion, he must pay it back to them."

This account and entry of the father was held not to be conclusive evidence of an advancement, but to be open to be repelled by other evidence to the contrary, consisting of the declarations of the father, that the account was not intended as evidence of either an advancement to the son, or of an indebtedness against him.

It was remarked by the court, that "trifling presents, money expended for education," etc., "could not be presumed to be an advancement." Expenses for maintenance and education of children by their parents were held to be of a character not to be changed into advancements by the mere declarations of an intention to that effect by the

parent, unless he made such intention manifest by his will. This is a sensible rule which has been very generally accepted.

To turn such expenditures into an advancement should require a particular arrangement with children of an age to make agreements; or the expenditures should be made under circumstances which bear evidence of an intention to bestow the opportunities of education upon one more than upon others, as a particular investment designed as the source of future livelihood; as, for example, educating a son to some one of the professions or callings designed to be practiced as the source of living. Such expenditures have been sometimes properly treated as so much capital appropriated to business, like capital furnished to merchandise or other calling which required investment; and have been regarded as advancements, in like manner with money furnished for other callings, which are more directly based upon pecuniary investments.

Beyond such considerations and purposes, there is no good sense or propriety in treating the expenditures of parents in the maintenance or education of their children as advancements.

THIRD. NO DELIVERY OR TRANSFER OF MONEY OR PROPERTY BY THE PARENT TO THE CHILD, WHICH LEAVES THE CHILD LEGALLY INDEBTED TO THE PARENT, SO THAT HE COULD BE ADJUDGED TO PAY THE PARENT THEREFOR, IN ANY FORM OF ACTION, EITHER AT THE SUIT OF THE PARENT WHILE LIVING, OR AT THE SUIT OF HIS EXECUTORS OR ADMINISTRATORS, AFTER HIS DECEASE, CAN BE REGARDED AND TREATED AS AN ADVANCEMENT.

Upon this proposition the reported decisions are uniform. In many of the cases the question in dispute has been, whether the money or property transferred was a sale, a loan or an advancement. But no case holds that a transfer by way of sale or loan is an advancement. And no transfer which was made as a sale or loan can afterward be changed

to an advancement except by the agreement of the parties thereto.

There is an example of an attempt of that kind in *Harris' Appeal*, 2 Grant's Cases, 304. There was in that case originally a debt due from a child to his parent. The debt became barred by the statute of limitations. The father then undertook to convert the debt into an advancement by making declarations to that effect, without the consent of the child to the attempted mutation. It was decided that he could not thus change the transaction to an advancement.

The same doctrine was held by the court in *Leving v. Rittenhouse*, 4 Wharton, 130.

Under this rule, promissory notes are evidence of debts, not of advancements. To convert them into advancements, when made by a child to his parent, requires a new arrangement, whereby the parent delivers up or surrenders the notes as an advancement. At least, there must be a new arrangement, wherein the parent agrees to treat the notes as an advancement. *Vaden v. Hance*, 1 Head. 300, is a case of that character. In that case, the intestate held several notes against a deceased son. There was no evidence to show that they were intended as advancements. There was no evidence in the case, except the notes themselves. The court, in deciding the case, used this language: "In the absence of proof to that effect, we have been unable to find any authority that these notes are to be regarded as advancements. We think that, *prima facie*, they must be treated as debts."

In *West v. Bolton*, 23 Geo. 531, promissory notes made by the son to the father were held, after the decease of the father, to be evidence of a loan, and not of an advancement. But this presumption in favor of a loan was decided to be liable to be repelled by other evidence; and that whether the transaction between the father and the son was really an advancement or a loan, must depend upon the intention of the parties to it, and was a proper question for a jury.

A like decision was had in Indiana, in *Shaw v. Kent*, 11 Ind. 80. The transaction in that case consisted of a deed

TO LANDS BY DESCENT.

and in fee made by the father to the son
once showing clearly what the conveyance
subject; whether it was a conveyance by way
of advancement. The evidence left that
doubt. It was held to be a proper question for

as a case, in Pennsylvania, where the father took
his son for money furnished him. The bonds
and to be evidence of a debt, and not of an advance

High's Appeal, 21 Penn. 283.

The presumption of a debt was held to be strengthened,
by the fact that no bond or other evidence of debt was taken
or farming utensils furnished to the son by the father at the
same time.

In *Porter v. Porter*, 51 Maine, 376, the action was brought
by the father upon a promissory note made by the son. The
son set up, as defense, that the note was intended as an
advancement. The court rejected parol evidence, offered to
show that the transaction was intended as an advancement;
holding, that, as there was no ambiguity in the phraseology
of the note, it was not subject to explanation by parol evi-
dence.

That decision was due to a statute of that State more,
perhaps, than to any general rule of evidence. The statute
provided, that "gifts and grants of real and personal estate
to a child, or grandchild, are deemed an advancement where
so expressed therein, or charged as such by the intestate, or
acknowledged in writing to be such."

A like decision was made in Massachusetts, under a simi-
lar statute, in *Barton v. Rice*, 22 Pick. 508. The Mass-
achusetts statute provided, "that all gifts and grants shall
be deemed to have been an advancement if they are expressed
in the gift or grant to be so made, or if charged in writing
by the intestate, as an advancement, or acknowledged in
writing as such by the child or other descendant."

It was said: "The statute does not expressly declare that an advancement shall not be proved in any other manner; but that, undoubtedly, is the meaning of the statute."

There is a difference between proving that a promissory note was made in consideration of money advanced, and that no indebtedness was intended, and proving that a note was surrendered and the indebtedness canceled by way of making an advancement. The one contradicts the evidence which the note bears on its face, and the other merely cancels the note by a new contract or arrangement.

Blanc v. Bertrant, 16 La. An. 294, is a case of surrender of notes by way of advancement.

In that case, money had been loaned by the parent to the child, and the child gave notes therefor. Subsequently the notes were surrendered to the child, and the surrender or remittance was held to be evidence of an advancement. There were two transactions. One was a loan and the other an advancement.

There seems to be no dispute or conflict of authorities, that a transaction which creates an indebtedness of the child to the parent is wholly a different matter from a transaction which makes an advancement to the child from the parent. Both transactions are founded in contract, but the character and effect of the contract in the one case is widely different from the character and effect in the other.

Money loaned is not an advancement. Nor is any other demand an advancement, which has been incurred as a debt or which is proved by the evidence used to prove a debt.

The case of *Ashley*, appellant, etc., 4 Pick. 21, illustrates this point. That was an appeal by one of the heirs at law of John Ashley, from a decree of the judge of probate, determining that the sum of \$1,175.82 was charged to the appellant as an advancement.

The evidence, upon which the probate judge based his decree, was in form of a book account, wherein the appellant was charged as follows:

SHEFFIELD, *May* 1, 1807.

Henry Ashley, Dr.

To five hundred dollars cash..... \$500 00

To ten dollars to Parks..... 10 00

And so on in the same manner with ten more items, amounting in all to \$1,175.82, the sum in question.

This charge was made in the book of the decedent, wherein he kept his account with various individuals.

The court reversed the decree of the probate judge. The ground of the decision was, that the evidence proved a debt against the appellant, and not an advancement.

The court distinguished that case from *Bulkley v. Noble*, 2 Pick. 337, on the ground that the form of the book and the form of the charge made therein were "wholly dissimilar."

In that case the entry was found in a memorandum book, wherein other charges were made expressly as advancements to other children; and the entry itself was headed "articles that I let my daughter, Nancy Porter (wife of Gurdon Bulkley), have in Albany."

This entry was held to be sufficient evidence of an advancement, and to distinguish the case from the case before the court.

The same principle was held to control in *Barton v. Riese*, 22 Pick. 508. The only evidence of the alleged advancement in that case was a promissory note made by the son to the father. It was held that the note was "clearly evidence of a debt."

These cases in Massachusetts were made to turn upon the construction of statutes in that State relating to advancements. But there seems to be no good ground to claim that the statutes in question were any thing more than declaratory of the rule as it exists in the States generally.

SECTION III.

HOW AN ADVANCEMENT MAY BE PROVED; THE DIFFERENT RULES APPLICABLE THERETO.

FIRST. A DEED FROM A PARENT TO A CHILD, IN CONSIDERATION OF LOVE AND AFFECTION, IS EVIDENCE OF AN ADVANCEMENT. WHEN THAT CONSIDERATION IS SO EXPRESSED IN THE DEED, THE DEED ITSELF IS PRESUMPTIVE EVIDENCE OF AN ADVANCEMENT. IF EXPRESSED TO HAVE BEEN FOR A PECUNIARY CONSIDERATION, IT MAY BE SHOWN BY EXTRINSIC EVIDENCE, PAROL OR OTHERWISE, THAT THERE WAS NO PECUNIARY CONSIDERATION. WHEN THE CONVEYANCE WILL BE PRESUMPTIVE EVIDENCE OF AN ADVANCEMENT.

SECOND. WHEN A PARENT PURCHASES LAND AND PAYS FOR IT, AND TAKES THE DEED OF CONVEYANCE IN THE NAME OF A CHILD, THE PRESUMPTION IS OF AN ADVANCEMENT TO THE CHILD. AND THAT PRESUMPTION IS CONCLUSIVE, UNLESS IT BE REPELLED BY OTHER EVIDENCE.

THIRD. HOW THE INTENTION TO MAKE AN ADVANCEMENT MAY BE PROVED BY AN ENTRY IN BOOK, OR OTHERWISE, BY THE PARENT.

It should be borne in mind that what are, or are not advancements must always depend upon the intention of the parties at the time of the donation; and where there is no express declaration of intention, much may be learned, upon that point, from the condition in life of the parties and the circumstances which surround them.

Youngblood v. Nestor, 1 Strobb. Eq. 122.

There was a point in this case, whether the intestate had the right to fix the valuations of advancements. The court prefaced their consideration of this subject as follows: "The valuation of advancements has a material influence in the distribution of the property remaining in the hands of the intestate at the time of his death; because the proportion in which the respective distributees are to participate in the latter must depend on the higher or lower value to be put on the former."

They then dispose of that point and say: "The question, then, is, whether a mere direction by the intestate, as to the valuation of his advancements, can take the property, of

which he dies possessed, out of the operation of the law of intestacy — or modify its distribution under that law; and we are of opinion it cannot." "In the absence of a testamentary disposition, the statute controls the distribution of the property as intestate property; and it is not competent for a party to give any other direction than the statute gives, unless, by a will, he deprives the property itself of the character of intestacy."

It is true as a general rule that whatever property is given or transferred by the parent to the child intended to be an advancement, will be so regarded in law. As before remarked, the intention of the party conveying or transferring is the criterion by which the character of the transaction is to be decided. The questions, when and how the intention is to be manifested, in order to render a transaction an advancement, are the difficult questions to answer, and will require some examination of the books.

We have already seen that a transaction which bears evidence upon the face of it, or in its surroundings and accompaniments, that it was a debt, so that the party receiving, incurred in taking it a personal liability to pay for it, cannot be allowed as an advancement. And so where the property is plainly intended as a gift, or where the expenditure is made in the discharge of a parental duty, the question of advancements cannot arise. It is only when the intention is not clearly expressed in that respect, and when the facts and circumstances are not such as to make the intention plain and obvious, that the law is to be invoked with its rules and principles to aid in determining what the intention was.

The authorities all agree that whether a thing is or is not an advancement, depends upon the intention of the parent at the time the property is bestowed. It is true, undoubtedly, that the intention of the child in accepting, is equally important to the character of the transaction; but it is not so difficult of proof, and has therefore been so generally overlooked as to be sometimes regarded as in no way necessary. The fact that the child accepts the property is

conclusive against him that he assented to all that the parent proposed, either expressly or impliedly. Consequently, it is necessary only to show what the parent intended, that is, to show what intention he expressed by words, or what intention the facts and circumstances plainly indicated, in order to show what the intention of the child was, in accepting, and what the character of the transaction really was. This is made apparent by a class of cases, wherein it has been held that the father could not alter the character of the transactions by an after-expressed intention that was not assented to by the child.

Thus in *Yundt's Appeal*, 13 Penn. State R. 575, it was said, page 580: "Nothing seems better settled than that the *ex parte* declaration of a parent of an intention to treat an existing debt as an advancement not communicated nor agreed to by the child, nor accompanied by an act sufficient to obliterate the obligation as a debt, can change it into a gift by way of advancement, whether the evidence be offered by the child to defeat the recovery of the debt, or by the representatives of the parent to bar the child's claim to a distributive share of the parent's estate."

In *Batton v. Allen*, 1 Halst. Ch. R. 99, notes made by a son to his father were held to be no evidence of an advancement. And the declaration of the father that he had fully advanced the son was held not sufficient to change the notes to an advancement, or to prove an advancement.

It was made a point in the case, that the amount of the notes should be treated as an advancement, because the notes were outlawed and not therefore available as debts. The court declined to pass a decision upon that question, on the ground that a disposition of the case did not call for a decision upon that point. After discussing the evidence, the chancellor said: "I am unwilling to consider the notes as evidence either of advancement to James, or of debt due from him to the estate."

That a demand is outlawed as a debt, certainly does not change the debt to an advancement, unless it has been

allowed to outlaw with an arrangement that the amount should be treated as an advancement; and then it becomes a new contract.

It may be a difficult matter to arrange questions of evidence, upon this subject, into distinct and well-defined classes. But if the classification cannot be made perfect, an approximation thereto may be effected, which will aid the student in his researches.

First. In regard to conveyances of land from a parent to a child, it seems to be a rule of universal application that a deed, the consideration of which is expressed to be for love and affection, is to be regarded as an advancement. And in some of the States they have incorporated such rule in their statutes. But where that is not the statute provision, there seems to be an established rule of similar import.

In Vermont, deeds of conveyance of lands, from a parent to a child, expressed to be made for love and affection, are made, by statute, evidence of an advancement.

Newell v. Newell, 18 Verm. 24; *Weatherhead v. Field*, 26 id 665.

In *Newell v. Newell*, there was a deed of lands from father to son, expressed to be for a money consideration. It was held not to be *prima facie* evidence of an advancement. Whether the character of the deed, in that respect, could be controlled by parol evidence, was declared to be questionable.

In Rhode Island there is a statute providing, that, "if real estate shall be conveyed by deed of gift, or personal estate shall be delivered to a child or grandchild and charged, or a memorandum made thereof in writing by the intestate, or by his order, or shall be delivered expressly for that purpose in the presence of two witnesses, who were desired to take notice thereof, the same shall be deemed an advancement to such child, to the value of such real or personal estate." *Law v. Smith*, 2 R. I. 244.

In the case here cited, the statute was held not to exclude other and especially higher evidence than is therein prescribed, but only evidence of an inferior character.

In that case, chattel property had been delivered by the intestate to his daughter, and a memorandum made by him that the articles delivered were lent. It was held, that if it was understood that the articles were not to be returned or reclaimed, they were an advancement. The fact that they had not been reclaimed or returned, together with the declarations of the intestate and of the daughter, that they were advancements, was held sufficient evidence that they were so.

The memorandum made by the father, that the property was only lent to his daughter, was calculated to repel any presumption of an advancement. But that presumption was overcome by the facts and circumstances of the case.

In New Jersey, in *Gordon v. Barkelow*, 2 Halsted Ch. R. 94, a deed of bargain and sale, wherein the consideration was expressed for one dollar, and natural affection, made by a father to a child, was held to be evidence of an advancement.

In New Hampshire there is a statute provision similar to the Vermont statute, that a deed of lands from a parent to a child, expressed to be in consideration of love and affection, shall be evidence of an advancement.

Comings v. Wellman, 14 N. H., 237.

In that case there was a conveyance in fee by the father to the son, and a conveyance by the son to the father for the life of the latter. It was decided by the court, that only the remainder in fee remaining in the son after conveying to his father for life was to be reckoned an advancement.

In another case, in Vermont, *Adams v. Adams*, 22 Verm. 50, it was held, that a deed of land, in order to be treated as an advancement, must show on the face of it that it was so intended by a direct expression to that effect, or it must be expressed to have been made in consideration of love and affection; and that a deed expressed to have been made for a pecuniary consideration could not be made an advancement by merely showing that there was, in fact, no consideration other than love and affection.

In Massachusetts there is a statute, under which it is held, "that all gifts and grants shall be deemed to have been made in advancement, if they are expressed in the gift or grant to be so made, or if charged in writing by the intestate as an advancement, or acknowledged in writing by the intestate as an advancement, or acknowledged in writing as such by the child or other descendant." R. S. chap. 61, § 9.

Barton v. Rice, 22 Pick. 508.

It was held in that case, as it had been held in other cases in that State, that parol evidence was not admissible to vary the character of a deed of conveyance of land in that respect. This restriction upon parol evidence was put entirely upon the provisions of the statute.

The rule seems to be established in Massachusetts, that advancements must be proved as prescribed by the statute; and that, at least, no testimony inferior to that prescribed by the statute is admissible for that purpose.

Bigelow v. Pool, 10 Gray, 104.

In that case, there was produced in evidence a little book of accounts by the intestate, purporting to state "the moneys I have advanced to my children, severally, and to which I shall give credit to any and each of them as they may pay me from time to time."

There was evidence in regard to one son, showing his insolvency, and the assent of the father to his discharge in bankruptcy, for the very sum charged in the book.

It was held by the court, that the evidence did not prove an advancement.

In New Jersey, in *Speer v. Speer*, 1 McCarter, 14 N. J. Ch. R. 240, it was held, that a deed of conveyance of lands by a father to his son, expressed to be for natural love and affection, was presumptive evidence of an advancement. There is nothing in the statutes of that State which prescribes any particular rule of evidence in respect to advancements. And it was decided, of a deed expressed to have been made for a

pecuniary or valuable consideration, that it did not prove an advancement.

That was a bill for partition of certain real estate. The father died intestate, leaving a son and two daughters. The daughters filed the bill, charging that the son had received of his father, during the life-time of the latter, a deed of lands, equal in value to the shares of the other children, and that the son was, therefore, entitled to no part of the real estate of which the father died seised. The son denied the charge of an advancement to him, and claimed to share equally with the daughters.

It appeared in evidence that the intestate had, during his life-time, conveyed one-third of his real estate to his son. The son claimed that the conveyance was made in consideration of his services; the daughters that it was intended as an advancement.

It was proved, that the father had declared that he had given it to the son, and intended to give the rest to his daughters; that he intended to give no more to his son. The consideration expressed in the deed was a pecuniary one of \$4,500.

The court decided it as a question of fact, that the intention of the father was to make an advancement to the son by the deed in question; and they held the conveyance to have been an advancement.

The objection was taken, that the parol evidence, showing that there was no pecuniary consideration for the deed of conveyance by the father to the son, was inadmissible because it contradicted the deed. It was contended, that, if admitted, the evidence invalidated the deed, and that it was not permitted by the law to invalidate a deed in that way.

The truth of that position could not be denied, as a general rule, and was not denied by the court. But the court took the ground that the parol testimony, showing a different consideration from that expressed in the deed, was generally admissible and allowed in other classes of cases; that it was like a receipt always explainable by other testimony.

They took another ground peculiar in a measure to the class of cases before them ; that the evidence did not invalidate the deed or have any tendency to invalidate it, for the reason that it only disclosed the purpose and intent with which the deed was made, to affect not the rights of the parties to the deed, as between themselves, but the interest and rights of the grantee only, as one of the heirs at law of the grantor, in relation to his co-heirs. This was a question to which the deed was collateral and only incidental, and capable of explanation by extrinsic evidence, parol or otherwise.

A like question was decided in substantially the same way in *Kingsbury's Appeal*, 44 Penn. St. R. 460. The deed in that case was expressed to be made in consideration, in part of love and affection and in part of a pecuniary character. Parol evidence was admitted to show that there was an intention merely to make an advancement.

In *Parks v. Parks*, 19 Md. 323, the questions were similar. The case arose on a bill for the sale of the real estate of an intestate for the purpose of distribution among his heirs at law. The chief question of litigation was, whether a certain deed of conveyance of real estate was or was not an advancement. It did not appear upon the face of the deed, that the conveyance was intended as an advancement, either by a direct expression to that effect, or by inference ; but extrinsic evidence was introduced to determine that fact. It was held to be admissible. The objection that it might impeach the deed, and that the deed could not be impeached in that way, was met by the court with the answer, that the evidence was not offered to impeach the deed, but only to show the design of the parties thereto, in regard to the relative rights of the grantee to other children in other property. The principle upon which testimony was to be admitted in such cases was stated and discussed. It did not affect the character of the instrument, as between the immediate parties thereto, but only went to show that the land conveyed, as so much property in value, so far affected the rights of the grantee and his co-heirs in

and to other property, as to determine in a measure the amount each should receive of the latter. The direct question was, how much each of the heirs should receive of property left by the intestate? That depended upon another question, whether one had received certain land as an advancement from the intestate before his death. Evidence tending to show what the intention of the conveyance was, in that respect, did not tend to impeach the deed, or change its effect as between the immediate parties thereto. The question is analogous in principle to a question of payment of an alleged indebtedness. One party charges another with being indebted for money loaned. The other answers, I paid you by a certain deed conveying lands. The fact does not appear on the face of the deed; but it would not be questioned that such fact might be shown by extrinsic evidence.

In this case, there was also this further question: The grantee claimed that the deed was made by him in payment for his personal services. It appeared that the services were not gratuitous, but were rendered upon an express contract, for which he was compensated. It was held, that services, so rendered and paid for, could not be interposed to repel by inference the intention of an advancement by the parent.

It was held, in *Christy's Appeal*, 1 Grant's Cases, 369, that the question whether a deed of conveyance of land from a parent to a child is to be treated as an advancement, or as a gift, must depend upon the intention of the parent at the time the deed was made; and that the declarations of the parent at the time of making the conveyance, or of the child at that time, or at any other time thereafter, were admissible.

In *Miller's Appeal*, 31 Penn. St. R. 337, it appeared that a father had conveyed a farm to his son, and there was an agreement in writing, that one-third of the price "shall be his hereditary portion from his father." The other two-thirds were to be paid in eight yearly payments. The conveyance was held to be an advancement to the amount of the one-third; and it was further held, that the deed did not estop

the son from claiming an equal share of his father's property after deducting the one-third.

In *Phillips v. Chappell*, 16 Geo. 16, it was held, that the conveyance by the father of a slave to a child, bore no evidence on the face of it whether it was intended as a gift or as an advancement. The declarations of the father were held admissible to show the character of the deed of transfer as against the daughter.

It seems to be a generally adopted rule that a deed from a parent to a child, in consideration of love and affection, is presumed to be an advancement.

It was so held in Connecticut, in *Hatch v. Straight*, 3 Conn. 31. In the deed, in that case, the consideration was expressed as follows: "in consideration of love and affection and of five dollars." The latter consideration, being merely nominal, was held insufficient to repel the presumption of an advancement authorized by the other consideration or want of any, except love and affection.

The same ruling was had in *Sayles v. Baker*, 5 R. I. 457.

In *Hatch v. Straight*, the declarations of the intestate as to the effect of his deed before made and delivered, and his intentions in giving the deed, were excluded as not being proper evidence. The ground of the exclusion was, that declarations made posterior to the delivery of the deed could not be admitted to vary its legal operation; not even to show that the deed was made as an advancement.

The statutes of Connecticut, relative to advancements, were declared by the court to be almost a literal transcript "of 22 and 23 Car. 2, chap. 10, usually denominated, the statute of distributions."

The rule of evidence in this class of cases was very clearly stated, and the reasons therefor given, in *Johnson v. Belden*, 20 Conn. 322, before cited for another purpose.

It is said, in the opinion of the court: "Questions of advancement *generally* arise in the settlement of intestate's estates. If an estate be testate, the will of the testator is the only law of distribution. But where wills exist, they

sometimes dispose of the estate in reference to former advanced portions; in such cases, the law of advancements must also be consulted.

"Questions of advancements, also, are always questions of intention, and the difficulties in solving them are generally found in the kind of evidence, by which such intention is to be proved.

"In some cases it has been considered that this intention, if not expressed, shall be inferred as matter of law, from the character of the act; as, where a parent conveys land to the child, from consideration of love and affection only; and if a parent pay the consideration money for land or for stocks, conveyed by another for the child. In these and perhaps other cases, the presumption of advancement may be rebutted."

SECOND. WHEN LAND IS PURCHASED BY THE PARENT AND THE DEED TAKEN IN THE NAME OF A CHILD, THE PRESUMPTION IS, THAT THE AMOUNT SO EXPENDED IS AN ADVANCEMENT TO THE CHILD; AND THAT PRESUMPTION IS CONCLUSIVE UNLESS REPELLED BY OTHER EVIDENCE.

Upon that principle, it was held in *Douglas v. Brice*, 4 Rich. Eq. R. 322, that slaves purchased by a son and a daughter, with the property of the father, were advancements by the father.

A deed to a daughter by her father during her life, and after her death to her children, is an advancement only to the extent of the life estate. It was so held in Tennessee in *Cawthorn v. Coppedge*, 1 Swan, 487.

In North Carolina it is held, that, by the statutes of that State, only transfers of property from the parent to the child can be treated as advancements.

Headen v. Headen, 7 Ired. Eq. R. 159.

The general rule is that the purchase by one person in the name of another, when the other is not in the relation of

wife or child, creates a trust in favor of the person who furnishes the money..

Rider v. Kidder, 10 Ves. 360 ; 2 Story's Jur. § 1201.

But where that rule has not been changed by statute, there are various exceptions to it ; or, more properly stated, there are various ways whereby the presumption of a trust may be repelled. It is said in Story's Equity Jurisprudence, § 1202, after stating several exceptions to the rule : " But a more common case of rebutting the presumption of a trust is, where the purchase may be fairly deemed to be made for another from motives of natural love and affection. Thus, for example, if a parent should purchase in the name of a son, the purchase would be deemed *prima facie*, as intended as an advancement, so as to rebut the presumption of a resulting trust for the parent. But this presumption, that it is an advancement, may be rebutted by evidence manifesting a clear intention that the son shall take as a trustee."

This presents the rule in its true character. It is not a matter of right in the child as against the parent or co-heirs. It is only a rule of evidence in showing what was the arrangement between the parent and the child, touching the property transferred to the child. And the rule amounts merely to this, that the conveyance of land by the parent to the child, or the purchase of land in the name of the child, unexplained by any testimony, circumstantial or otherwise, is evidence of an advancement. And so it was understood by the author here quoted, for he says in the next section, § 1203 : " The moral obligation of a parent to provide for his children is the foundation of this exception, or rather of this rebutter of a presumption. Since it is not only natural but reasonable in the highest degree, to presume that a parent, by purchasing in the name of a child, means a benefit for the latter, in discharge of this moral obligation, and also as a token of parental affection. This presumption in favor of the child, being thus founded in natural affection and moral obligation, ought not to be frittered away by nice

refinements. It is, perhaps, rather to be lamented, that it has been suffered to be broken in upon by any sort of evidence of a merely circumstantial nature."

This rule of evidence was very elaborately discussed and criticised in *Dyer v. Dyer*, 2 Cox R. 92.

It is therein conceded that it has been determined in so many cases, that the fact of the grantee of the deed being a child, is a circumstance of evidence to prove that the property was intended as an advancement, that it should not be disturbed. It is said: "We should be disturbing landmarks if we suffered either of these propositions to be called in question, namely, that such circumstances shall rebut the resulting trust, and that it shall so do, as a circumstance of evidence. "I think," says Lord Chief Justice Eyre, who delivered the opinion, "it would have been a more simple doctrine if the children had been considered as purchasers for a valuable consideration. Natural love and affection raised a use at common law; surely then it will rebut a trust resulting to the father. This way of considering it would have shut out all the circumstances of evidence, which have found their way into many of the cases, and would have prevented some very nice distinctions, and not very easy to be understood. Considering it as a circumstance of evidence, there must be, of course, evidence admitted on the other side. Thus, it was resolved into a question of intent, which was getting into a very wide sea without very certain guides."

There are old cases where this rule of evidence was held to control in England. In *Mumma v. Mumma*, 2 Vern. 19, the purchase of a copy-hold estate by the father, in the name of his oldest son, was held to be an advancement to the son, and not a trust for the father.

The same rule was applied in *Taylor v. Taylor*, 1 Atk. 380.

Chancellor Kent states it as a general rule, that "an advancement of money or property to a child is, *prima facie*, an advancement, though it may be shown that it was intended as a gift, and not an advancement."

The learned author must have intended to be understood to say, that every donation of money or property is, *prima facie*, an advancement. An advancement is, of course, an advancement.

But the rule, as thus stated and qualified, has its exceptions. For example: trivial presents, necessary wearing apparel, expenses of maintenance and education, are exceptions to that rule. Every expenditure embraced within the obligations of a parent to his child is an exception. It is only when the parent goes beyond that, and donates property for other purposes, that it can be brought within the rule of advancements. At least, such expenses are exceptions, while children are infants.

It has been, very generally, held, that when a parent purchased land in the name of his child, the child being under age, the money paid by the parent is to be regarded as an advancement. This doctrine was recognized in *Jackson v. Matsdorf*, 11 Johns. 107; although, in that case, the court held it to be a trust, and not an advancement. It was so decided, on the ground that the intention of the father, not to make the purchase as an advancement, was manifest.

In *Proseus v. McIntyre*, 5 Barb. 432, the court proclaimed the same doctrine, as follows: "Upon the naked fact, that a father buys and pays for land, and has the deed made to an infant child, the inference of law is, that it is an advancement to the child, and not a resulting trust to the father. But it is always competent to meet and repel such inference, by proof that the father did not intend it as an advancement. In such cases, the question is one of intention entirely." But they decided, that, in that case, the intention of an advancement by the father, which might have been inferred from his buying land and taking a deed to an infant child, was repelled by other circumstances.

So, where a father sold lands to his son and took bonds for the purchase-money, and afterward surrendered one of the bonds, it was held that the bond surrendered was to be

regarded as an advancement, while those not surrendered were not to be so treated.

Hanner v. Hanner, 7 Ired. Eq. 142.

In Ohio, the statute permits of advancements by the conveyance of real estate, but allows of none by the bestowment of personal property.

Putnam v. Putnam, 18 Ohio, 347.

In *Taylor v. Taylor*, 4 Gilm. 303, the purchase of land by the father, in the name of a son, was held to be an advancement to the son, liable to be proved otherwise.

In *Bay v. Cook*, 31 Ill. 336, it was held, that, when a parent purchases land with his own means, in the name of his infant child, it has been generally considered an advancement. But they held the rule to be subject to a qualification as follows: "But it is a question of intention, each case to be determined by the reasonable presumption arising from all the facts and circumstances, showing it was not intended as an advancement." And they decided, in that case, that it must be treated as held in trust for the father, on the ground that it was taken in the child's name to defraud creditors.

The same general rule of evidence is held to be the law in Ohio, in *Creed v. Lancaster*, 1 Ohio St. R. 1.

So in Tennessee, in *Dudley v. Bosworth*, 10 Humph. 9, where the son took a conveyance of land to himself, and the father paid the purchase-money, the presumption was held to be that the money paid was an advancement.

In Pennsylvania, in the case of *Murphy v. Nathans*, 46 Penn. St. R. 508, the mother purchased land and took the conveyance to her daughter. It was held to be presumptive evidence of an advancement. The chief question in this case was one of title between a prior unrecorded mortgage and the daughter as a purchaser under the conveyance procured by her mother. It was held, that the daughter was to be regarded the purchaser, the same as though the money had been paid by her; and as she knew of the mortgage before the purchase, she was not to be protected against it;

or, in other words, her title was not to be preferred to the mortgage title, although the mother was ignorant of the mortgage.

THIRD. HOW THE INTENTION TO MAKE AN ADVANCEMENT MAY BE PROVED BY AN ENTRY IN BOOK, OR OTHERWISE, BY THE PARENT OR CHILD.

It is difficult to lay down any rule upon this point, beyond the very general one, that, whatever entries the parent may make at the time of transferring property to the child, expressing his intention in regard thereto, are admissible to determine the character of the transaction. They may be made in the deed of conveyance, in a book, or in any other form that plainly indicates the intention. How, and when the entry shall be made, what must be expressed, and how expressed, have been the subjects of judicial determination in almost every conceivable form. An example of entry is found in *Clark v. Warner*, 6 Conn. 355.

In that case, the deceased made charges in his account book, against his son, as follows :

“SALISBURY, *January*, 1803.

“*Nathaniel C. Clark, my son, Dr.*

“The following articles that may be charged, are to go towards his portion.”

The account continued until the third of February, 1820, and then amounted to \$1,046. On the fourth of January, 1823, the deceased, then in life, wrote on the page opposite, the credit side of the book, as follows :

“SALISBURY, *January*, 1823.

“To the contrary, by a gift, I balance my son, Nathaniel C. Clark’s account.

“N. CLARK.”

He also wrote under the charges, and on the same page, as follows :

"SALISBURY, 4th January, 1823.

"The above account I discharge, by gift.

"NATHNL. CLARK."

It appeared, also, that similar entries were made, in the same account book, against the other appellant, in which he stood charged with \$782, and credited in the same manner.

The entries were held to prove an advancement. It was said, by the court: "It is quite clear that the articles comprising the account were delivered and charged as part portion. Such is explicitly declared by the intestate, and, had there been nothing else in the case, it would have been impossible to raise a question. The whole doctrine of advancements, according to our usages, supports this idea."

In regard to the entries, that these charges were discharged and balanced, it was said: "Those entries do not, in any degree, vary the case. If they are to receive their greatest possible operation, they would have the effect only of a gift, by the father, to these children; and, in that view, according to the doctrine of this court, in *Hatch v. Straight*, 3 Conn. 31, they must be deemed advancements. Gifts thus made are presumed to be advancements."

There is no room for question, in that case, that the first entries proved an advancement. They bear evidence of that intention on the part of the intestate. But it is equally clear, that the subsequent entries bear evidence of a change of that advancement to a gift. They were, therefore, revocations of the advancement, and a change of its character to a gift. The assent of the donees, in that case, cannot be regarded as wanting to the change; for no such point was made. That part of the decision can be justified only upon the ground upon which it is placed in the opinion, that a gift is equivalent to an advancement, and that, therefore, the changing the advancement to a gift, by the subsequent entries of the intestate, did not, in fact, produce any change at all.

The error of the decision in that respect is apparent. There is a difference between a gift and an advancement;

one as distinctly recognized and established, in the authorities generally, as the difference between a debt and an advancement. And that difference is this: after the death of the intestate, and upon a distribution of his property among his heirs at law and the next of kin, a gift has no place in diminishing the part or portion of the donee, and increasing the part or portion of the other heirs; while an advancement does diminish the share of the recipient, and increase the portions of the co-heirs.

The rule, that a gift from a father to a child is, presumptively, an advancement, does not cure the error. That rule applies only where it does not appear that the donation was intended as a gift. It is not founded upon the idea that there is no difference between a gift and an advancement. In the case under review, there was no ambiguity upon that point. The charges were first made as advancements. By the subsequent entries, they were revoked as advancements, and changed into a gift. The intention of the donor was unmistakable. He evidently understood the difference between an advancement and a gift. The court was probably confounded by the rule that a donation, from parent to child, is, presumptively, an advancement; and is to be treated as a gift only when the evidence repels the intention of an advancement. They overlooked the fact that the donor had, expressly, by his subsequent entry, repelled all intention of an advancement indicated by his first entry; or, else, they erred in assuming that a gift and an advancement were synonymous terms.

In Massachusetts, and some of the other States, there are statutes bearing upon this point. The Massachusetts statute provides, that "all gifts and grants shall be deemed to have been made in advancement, if they are expressed in the gift or grant to be so made, or if charged in writing, by the intestate, as an advancement; or acknowledged in writing as such by the child or other descendant."

It seems not to be claimed that this provision of the statute changes the rules of evidence in any respect, except that it excludes parol or verbal evidence, and all other evidence of a character inferior to that named in the statute. The reported decisions of that State seem to require some written testimony of the kind named in the statute, and to exclude all other.

The statutes have undergone some changes.

In *Quarles v. Quarles*, 4 Mass. 680, the facts of the case were as follows: Francis Quarles conveyed to his son, Samuel Quarles, by a deed, dated August 17, 1785, certain real estate in fee. On the same day, the son made and executed a deed to his father, wherein he acknowledged, that, in consideration of his father's conveyance to him, "he was fully satisfied and contented, as his share of his father's estate, and did thereby acquit and discharge his father's estate forever thereafter from having any demands thereupon as an heir to any part thereof." Both father and son died intestate. Then the children of Samuel Quarles, who were, of course, the grandchildren of Francis Quarles, brought this action, by writ of entry, as demandants, and were held to be barred by the agreement of their father, on receiving the deed of conveyance from his father.

A section of the statute then in force, act of 1783, ch. 36, § 7, was relied upon, in favor of the demandants, which provided, "that any deeds of lands or tenements, made for love and affection, or where any personal estate delivered to a child shall be charged in writing by the intestate, or by his order, or a memorandum made thereof, or delivered expressly for that purpose before two witnesses, who were bid to take notice thereof, the same shall be deemed and taken an advancement."

It seems to have been made a point in the case, that the evidence offered was not admissible to prove an advancement, because it was not within either of the classes of evidence enumerated in the statute, and that no other evidence than such as was therein specified was admissible.

The court ruled against this point, and, *per* Sedgwick, J., said in regard to it:

"It is evident, to my mind, that the intention of the statute was to substantiate certain species of evidence, which, without legislative provision, might be doubtful; and not to enumerate those particular species, to the exclusion of all others. Evidence of advancement may be given in many ways, by parol, by writing and by deed, other than that which is expressed; and if that evidence, derived from either of these sources (and in many instances it may be much more satisfactory than that mentioned in the statute), for the exclusion of which there could exist no good reason, be not admissible, there would exist many cases where there had been an actual advancement, without a possibility of proving it. What could be more absurd than that a charge or memorandum by the intestate should be evidence of the advancement of a child, while a solemn acknowledgment by his deed, as in this case, should not be at all admissible evidence for the same purpose? It is impossible to believe such could have been the intention of the legislature."

He then refers to *Scott v. Scott*, 1 Mass. 527, where it was held, of a deed, by a father to his son, conveying lands, expressed to have been made in consideration of love and affection, and of five shillings paid by the son to the father, that the presumption of an advancement thus raised by the deed was properly removed by other and extrinsic evidence. It does not appear in the report what the evidence was. The point decided was, that the consideration named in the deed was not conclusive evidence, under the statute, of an advancement, but was open to contradiction in that respect. It is intimated, that the pecuniary consideration of five shillings may have left the deed open to the contradiction.

See *Kenney v. Tucker*, 8 Mass. 148.

In a subsequent case, *Whitman v. Hapgood*, 10 Mass. 437, there was a question, whether a deed made by a father to his son, dated May 5, 1798, wherein the consideration was expressed to have been love and affection, and a desire to see

him comfortably settled in the world, was evidence of an advancement.

The father had died intestate, in July, 1806, and, in 1805, the statute of 1783, before cited, had been changed to read : "That all gifts or grants made by the intestate, to any child or grandchild, of any estate, real or personal, in advancement of the portion of such child or grandchild, and which shall be expressed in such gift or grant, or otherwise charged by the intestate in writing, or acknowledged in writing by the child or grandchild, as made for such advancement, such estate, real and personal, shall be taken and estimated in the distribution and partition of the intestate's real and personal estate, as a part of the same ; and the estate so advanced shall be taken by such child or grandchild, toward his share of the intestate's estate."

It was contended, that, as the intestate died after this last named act went into effect, and after the former statute was repealed, "the expressions used in the deed, which, by force of that statute, would constitute this gift an advancement, had no such operation in this case."

The court declined to adopt that view, and said : "The deed was absolute and effectual against the grantor ; it contained no condition, nor any power to revoke or rescind it. Will the law, then, give effect to one part of a deed, viz., the conveyance to the appellant, and destroy the other part, which appears to have been the only equivalent for the conveyance, and the only motive for making it, that is, the deduction *pro tanto* from the portion of the appellant ? We think the words of the statute may be satisfied without giving to them this construction."

An opinion was also expressed, that, as the former statute declared that any deed made by a parent to a child, for love and affection, should be deemed an advancement, the court could not hear evidence to contradict it, or to give it a different construction. And they distinguished the case from *Scott v. Scott*, because of the small money consideration mentioned in the last named case.

There seems to have been no evidence offered which called for a decision upon that point. The distinction taken between the two cases is certainly a very small one. The statute was not denied operation upon a deed, because there was, in addition to love and affection, a small pecuniary consideration. If they had denied the application of the statute to the deed because of the money consideration, their distinction would have been logical. But after applying the statute, the distinction was illogical; for certainly the consideration of love and affection, and its effect as evidence in proving an advancement, as provided by statute, should not then have been suffered to be abated, only to the amount of five shillings' worth, as named in the deed. It was not vitiated to an amount beyond that, if the statute applied to it; and the application of the statute was not denied.

In *Bullard v. Bullard*, 5 Pick. 527, it was conceded, by counsel, that a deed, partly in consideration of love and affection, and partly in consideration of \$200, should not be regarded as an advancement of so much as the value of the land exceeded \$200, if the seventh section of the statute of 1783, chap. 36, was repealed by the statute of 1805, chap. 90. There was no question left to the decision of the court, except the repeal. But this case cannot be fairly used as authority, that a deed, expressed to be for love and affection, is not evidence of an advancement, under the statute of 1805. The counsel who made the concession was evidently mistaken in his notion of the statute. He probably thought that the more recent statute required the use of certain specific words to constitute an advancement.

There had then been a decision, *Bulkley v. Noble*, 2 Pick. 337, where the court had held otherwise. In the case cited, the court had decided that "no particular form of words is required by the statute to constitute an advancement, but it must be charged as such, that is, it must be charged in such manner as to show that to have been the intention. And, upon considering this charge, made in the same book in which the other portions are entered, and considering the

form of words used, we are satisfied that, in regard to this daughter, the same intention is manifested as toward the others."

The words, thus construed to prove an advancement, were, "Articles that I let my daughter, Nancy Porter, have."

The extent to which the statute goes in the exclusion of testimony in Massachusetts, seems to be truly expressed in *Barton v. Rice*, 22 Pick. 509. It was there held, that "oral testimony is clearly inadmissible to prove an advancement."

By the statute referred to, there were three modes of constituting an advancement, very generally mentioned. All gifts and grants were "deemed to have been made in advancement," if so expressed "in the gift or grant;" "or if charged in writing by the intestate as an advancement;" or acknowledged in writing by the child or other descendant.

The statute prescribed no particular form or words; but was only careful to secure evidence of the intention in writing, without saying that an advancement could not be proved otherwise.

In *Hartwell v. Rice*, 1 Gray, 587, several questions of evidence, as to advancements, were passed upon.

There was a receipt in this case, signed by one of the daughters and her husband, as follows:

"AUBURN, *February 2*, 1850.

"Received of Luther Stone five hundred dollars, it being a part of my wife's portion."

This receipt was found by the administrator in the desk of the intestate, upon his file of notes.

The court held, that there was therein sufficient proof of advancement.

There was another receipt, on account of another daughter, as follows:

"OXFORD, *January 21*, 1845.

"Received of Luther Stone eight hundred and three dollars and nineteen cents, for the support of Mrs. Sarah Hart-

well, at the State Lunatic Hospital, Worcester, Mass., as a part of her portion out of her father's estate.

"ISAAC B. HARTWELL."

It appeared in the case, that Mrs. Hartwell was insane when her husband gave these receipts, and that her father contributed toward her support in the hospital. This receipt was found among a bundle of letters and papers from the State Lunatic Hospital. It was held to be sufficient evidence of the advancement.

It was also offered to be proved, that, in 1852, the intestate made a will, which he afterward destroyed, the contents of which, as it was contended, disproved the alleged intention of advancements. This evidence offered was excluded by the court, and the exclusion sanctioned on appeal.

It was also offered to be proved by the intestate's declarations, that he had actually made and charged certain advancements against his children, differing from the charges in question in the case. This was held to have been rightly excluded.

The court held the receipt of the husband of the insane daughter to be both competent and sufficient evidence of the advancement to her; chiefly upon the general principle, that the husband, under such circumstances, has authority to act for the wife.

The evidence offered in regard to the will was excluded, on the ground, that it was no more in effect than the declarations of the intestate proved by parol evidence, and not admissible under the statute.

Still a later case, in Massachusetts, *Bigelow v. Poole*, 10 Gray, 104, holds to the same construction of the statute.

There seems to be nothing in the provisions of the statute of Massachusetts, or in the construction which has been given to it by the courts, to distinguish the laws of that State, in respect to advancements, from the laws of the States generally, in that respect, except that oral testimony of intentions is held to be excluded.

Some of the other States seem to have similar statutes. Among the number are California, Maine, Michigan, Oregon, Vermont and Wisconsin. Some of the States have only very general statute provisions, to the effect, that the distribution or division of estates of intestates shall be made so as to take into account the advancements made by the decedent in his life-time.

The general rules and principles which are allowed to govern the subject appear to be quite uniform throughout all the States. Where differences exist, they relate chiefly, if not wholly, to the mode of proof which has, in some States, been prescribed by statute.

The statutes of New Hampshire seem to have received a construction similar to that adopted in Massachusetts. In *Nesmith v. Dinsmore*, 17 N. H. 515, there was a paper signed, acknowledging the receipt of a certain sum as an advancement, in full of all claims to the estate of the parent. It was held a bar to any legal claim to either the real or personal estate of the intestate.

So, also, in Vermont, statute provisions, like those of Massachusetts, have received a like construction. *Weatherhead v. Field*, 26 Verm. 665.

In the case of charges upon a book, or otherwise, it is held, that the intention of the intestate to make an advancement must appear upon the face of the writing, and cannot be shown by oral declarations. But deeds made for love and affection are held evidence of an advancement.

See *Newell v. Newell*, 13 Verm. 24.

In the case of *Brown v. Brown*, 16 Verm. 197, it was held, that no particular words, or form of words, were required to be inserted in any writing, made by the father, to prove an advancement. It was held sufficient, that there was an entry on the book of the intestate of property delivered to a child, so expressed as to exclude the intention of a debt from the child to the parent; that the intention need not be stated in express language.

In that case, the evidence of the alleged advancement was as follows. There were certain entries, in the handwriting of the father, in a book, not an account book, under the following heading:

“Property delivered to Wm. and Abel Brown.”

Under this heading there were several entries, for notes, cattle, grain, etc. The evidence was held admissible to prove an advancement; that, although no express intention was therein found, it was proper evidence to submit to a jury, from which they might find an advancement. And it was expressly held, that no particular form of words was required by the statute to indicate the intention to make an advancement. In a later case, before cited, it is said: “The inference must be fairly drawn from the book itself, that an absolute gift or a debt was not intended.”

Weatherhead v. Field, 26 Verm. 665.

The court thus sanctioned the rule of evidence which has been applied generally in other States, where there is no statute regulating the mode of proof.

In Pennsylvania, in *Hugh's Appeal*, 21 Penn. St. R. 283, where farming utensils furnished by the father to the son were charged on his book as advancements, the evidence that they were advancements was held conclusive.

In the same case, it appeared that the father had furnished money to the son, and taken from him a bond for its payment; this was not only held to be a loan and not an advancement, but it was further held, that “a brief statement of the nature and amount of his estate, including, under the term ‘advance,’ the total amount of the debts against, and advancements to, his children, made on a small loose slip of paper from among his papers, after his death, does not amount to a release of his bonds against his children, or convert them into advancements.”

The decision of the last point was put on the ground that the evidence offered was not sufficient to prove a release of the bond as a debt, and a conversion of the amount into an

advancement; and not that it was impossible to change the debt to an advancement.

In *Miller's Appeal*, 40 Penn. St. R. 57, one question was, whether a certain sum charged in the father's account book, for schooling, professional instruction as a dentist and necessary expenses, against a son who was, at the time, a minor, was to be treated as an advancement.

The court said: "Questions of advancement are always questions of intention, and of intention when the property is received by the child. If it was a gift, then it cannot be converted into a debt by any subsequent act or intention of the father. If it was the creation of a debt then, it will continue a debt, notwithstanding any change of the parent's intention, unless some further act be done, or agreement be entered into, to convert it into an advancement. The difficulties in solving such questions are generally found in the evidence from which the intention of the parent is to be gathered. A parent may be liberal to a child, more so than to his other children, without imposing any obligation for future accountability, either to himself or to his estate. It is, indeed, a common sentiment, that equality is equity; but a father is under no legal obligations to make his children equal, and discrimination in a family is often equitable. The fact that one child has received more than another, therefore, raises no presumption that an advancement was intended. A contrary presumption exists where the money furnished is expended in the education of the child, for such education is a parental duty."

The court also stated another principle of evidence, touching the question of advancements; that it is "cogent evidence that an advancement is not intended by a father, and, in most cases, conclusive evidence, that the father takes from the child a security for the money furnished, or attempts to preserve evidence of it as a debt."

They further remark: "True, there is evidence that the case was not one of mere discharge of the parental duty to educate the son. The charges made indicate that. But

before the money can be treated as an advancement, there must be affirmative evidence that it was intended to be neither a gift nor the creation of a debt, but a portion."

The court takes a distinction between the conveyance of land to a child, by the parent, and furnishing personal chattels, or money; holding the first to presume an advancement, and the last to require other evidence of an intention to make an advancement, beyond the unexplained act of delivery or payment.

Upon the grounds thus indicated, the court held that the evidence did not prove an advancement.

It is evident that this case dissents from the doctrine, that a donation is *prima facie* evidence of an advancement, and requires evidence to prove it a gift; at least, that is the doctrine expressed of donations of personal property.

In the case of *Craig v. Moorhead's Executor*, 44 Penn. St. R. 97, the question arose, whether a written instrument was evidence of an advancement, or of a loan, of which the following is a copy:

"Received of my father-in-law, Samuel Moorhead, \$2,000, in part of my former wife's share of his personal estate, as willed to her, which sum I hereby bind myself to account for to his executors, and to his other legatees in the final settlement of his estate, without interest.

"Witness my hand and seal this 5th day of July, 1851.

"ALEXANDER CRAIG." [L. s.]

Moorhead died in 1853, and his executors sued Craig to recover the money thus received. He set up the defense, that the instrument bore evidence of a gift or advancement, and not a loan. But the court held otherwise, and gave judgment against him.

The money was held to be neither a gift nor an advancement, but a loan; and that the executor was entitled to recover.

The correctness of that decision may well be questioned. The paper bears evidence of receiving the money "in part of my former wife's share." This language indicates an

advancement. The obligation to account does not repel that indication, but strengthens it. If it was intended as a loan, there was nothing to account about, but merely to pay the money to the executors. The fact that no interest was to be allowed, that the accounting was to be had with the executors and legatees on the final settlement of the estate, and the absence of any promise to pay, bespeak the intention of an advancement rather than a loan.

In *Towles v. Roundtree*, 10 Florida, 299, a question of advancement arose upon the following facts: The father died intestate, leaving his widow, two daughters, and four grandchildren, the children of a deceased daughter by her husband, Uria Kemp. The question was, as to the distribution of the intestate's estate; and it was contended that the grandchildren were not entitled to the portion which would have belonged to their mother, because of an instrument in writing, signed by their father, Uria Kemp, as follows:

"\$3,068.34. — Received, this 1st of March, 1841, of Francis Roundtree, the sum of \$3,068.34, in full of all demands against the said Roundtree against his estate; and it being my proportionable part of the same, I do hereby relinquish all my right, title, interest and claim to any further demands against said Roundtree, his heirs and assigns, executors and administrators.

"(Signed) URIA KEMP."

Mrs. Kemp died before her father and before her husband. They were all three dead before the commencement of the action. The court held, that this written instrument proved an advancement against the grandchildren.

The ground upon which the contract of the husband seems to have been held to bar the wife's rights, and those of her heirs at law, was alleged to be, that the husband was entitled to receive the money by virtue of his marital rights, and became indebted to the wife therefor; that she had no claim left, except against him; and her heirs at law were in no better condition. This case was decided upon the authority of

Lindsay v. Pratt, 9 Florida, 150. The last named case was a suit for an account and distribution of both real and personal property. The husband of the daughter became indebted to his wife's father. The father and husband then agreed that the amount of this indebtedness should be regarded and treated as an advancement to the daughter. The wife was not present when the agreement was made, but when informed of it expressed no dissent. Upon the death of her father intestate, it was claimed by her co-heirs that this amount should be brought into hotchpot for their benefit, and the court decided in their favor.

As this agreement between the father and the husband was merely verbal, and some time had elapsed after it was made, the statute of frauds and limitations seems to have been interposed against it. To avoid those statutes the court disclaimed the idea that an advancement agreement was a contract within the meaning of the statute of frauds.

In *Ford v. Elingwood*, 3 Metc. (Ky.) R. 359, an instrument in writing, executed by the father to the son, was held to constitute an advancement. The instrument was as follows:

"James — I expect to marry soon, and if you will settle yourself on the Grayer farm you may have it.

"THOMAS FORD."

The son took possession in 1842, held to 1857, when his father died; and suit in partition was brought against him by the co-heirs at law and the widow. The court held the transaction to amount to a valid gift to the son by way of advancement.

In *Porter v. Porter*, 51 Maine, 376, the following paper was claimed to prove an advancement:

"Value received of E. P. I promise to pay him or order \$700, without interest, to be allowed on settlement, no interest to be reckoned."

The instrument was pronounced by the court to be a promissory note, payable on demand. It was further held,

that, as there was no ambiguity in the language of the instrument, it was open to no explanations by oral testimony. It should be recollected, that the statute of Maine, as to advancements, is like the statute of Massachusetts, and excludes evidence not in writing, as it has been construed.

FOURTH. WHEN PAROL TESTIMONY AND THE DECLARATIONS OF THE PARTIES, THE PARENT AND THE CHILD, ARE ADMISSIBLE TO EXPLAIN AND GIVE CHARACTER TO A TRANSFER OR BESTOWMENT OF PROPERTY IN ORDER TO PROVE IT AN ADVANCEMENT.

In Massachusetts and several other States there are statute provisions which are construed, as we have before seen, to exclude parol testimony in proof or disproof of advancements. But where there are no particular statute provisions excluding that kind of evidence, parol testimony and proof of the declarations of the parent and the child are admitted, under certain circumstances and to a certain extent, to give character, in this respect, to transfers of property, both real and personal, from a parent to a child.

The States which require evidence in writing have not expressly excluded oral evidence. And the construction put upon the statutes by the courts seems to go no further than to exclude evidence of oral declarations of parties in regard to intentions. It is not probable that the courts will go so far as to wholly exclude all oral testimony. Written instruments may be ambiguous and require explanation by oral evidence. It may be necessary to understand the circumstances and condition of parties, in order to determine the character of a donation from a parent to a child. And sometimes it may be important to determine the value of the property donated. It will hardly be contended that oral evidence of such facts is intended to be excluded by the statutes.

It has been held, in Connecticut, that parol evidence was admissible to contradict the consideration expressed in a

deed, and to show that nothing was in fact paid; and thus to make out that the conveyance of the estate was intended as an advancement.

Meeker v. Meeker, 16 Conn. 383.

The consideration expressed in the deed, in this case, was \$2,000. It was proved by the person who drew the deed, that there was no consideration paid; that the maker of the deed said, at the time of its execution, that he had before given his sons A., B. and D. \$1,000 each, viz., to B. and D. \$1,000 each in land, and to A. \$1,000 in money; that had he given his son H. \$1,000 at that time, it would have been worth to him at the time of giving the deed \$2,000; and that he wanted to make H., the appellant, equal to his other sons.

This evidence was taken under objections to its admissibility, and the land conveyed was decided to be an advancement.

There was also a question as to the amount of the advancement. It was contended, on the one side, that the donor had fixed the value at which it was to be brought into hotch-pot at \$2,000. On the other side, it was conceded that the measure of the advancement was fixed at \$2,000; but they offered to prove that the land was actually worth \$3,300, with a view to charge the donee with indebtedness to the amount of \$1,300. This evidence was excluded by the court.

It was held, that the grantor had not only conveyed the land as an advancement, but had fixed the amount of the advancement, and that he had a right so to do.

It is said of the grantor, that, "being the owner of the property, and having the power to dispose of it at pleasure, he might have conveyed it to his son as a gift, or partly as a gift and partly by way of advancement."

And it is further remarked, upon the same point: "The father could not justly charge the son with any sum, by way of advancement, greater than the value of the property;

but he might charge him as much as he pleased. Had there been no evidence as to the intent of the father in making the advancement, the value of the property would be *prima facie* evidence of the amount to be charged. But that intent being shown, governs the amount."

The general rule in regard to this class of evidence, where there is no statute which prescribes otherwise, is given in *Cecil v. Cecil*, 20 Md. 153, as follows: that the presumption of an advancement can be rebutted by parol evidence of the donor's declarations at the time of the gift, or by the donee's admissions afterward; or by proof of facts and circumstances from which the intention may be inferred.

There is a case in Alabama where parol evidence was admitted, to show that a promissory note, which was conceded to be evidence of a debt and not an advancement, was changed into an advancement by a subsequent arrangement between the parties.

Gray v. Gray, 22 Ala. 233.

There are other cases in Alabama where the same rule is applied.

Autrey v. Autrey, 1 Ala. Select Cases, 542; *Green v. Green*, 1 id. 450.

It was held to be the general rule, that donations of money or other property, by a parent to his child, are presumed to be advancements; and must be so treated, unless that presumption is repelled by the nature or character of the property, or by the circumstances attending the donation; and that the declarations of the parent are admissible to prove the intention of the donor in that respect.

It was further held, that, when the question arises between heirs, the subsequent declarations of the intestate were admissible in favor of the child to whom the property was delivered.

There is a case in Pennsylvania, where it appeared that the husband of a daughter of the intestate owed her father. It was proved that the daughter, in speaking of that debt,

said: "This we owe to father honestly." It was held, that there was nothing in that remark which could change the debt to an advancement.

Yundt's Appeal, 18 Penn. St. R. 575.

There is another case, in the same State, where the declarations of the father were held inadmissible to change a debt into an advancement.

Porter v. Allen, 8 Barr, 390.

It was an action against a son upon a promissory note. He sought to defend, by proving the declarations of his father, made after the note was made, that the money was not loaned, but was intended as an advancement. The court excluded the evidence, on the ground that the declarations were not made at the making of the note; and held such declarations admissible only when they were part of the *res gestæ*.

The oral declarations of the parent have been held inadmissible, in Kentucky, to give the character of an advancement to money or property furnished.

Clarke v. Clarke, 17 B. Monroe, 698.

The court said: "To permit the intestate to give away part of his estate to one of his children, and to enable the same child to claim an equal portion of the residue of his estate with his other children, by a mere verbal declaration that such was his intention, would not only defeat the purpose of equality designed to be effected by the statute under consideration, but would be a direct violation of the spirit and meaning of the statute on wills. It would virtually enable a person, by a mere declaration of his wishes and intention, to dispose of a portion of his estate, of which he dies intestate, in a different manner from that in which the law would dispose of it in the absence of such declaration, notwithstanding the law itself has pointed out the only mode in which this can be lawfully accomplished."

The same doctrine was applied in *Cleaver v. Kirk*, 3 Metc. (Ky.) R. 270.

The statute of Kentucky referred to provides, that "any real or personal property, or money given or devised by a parent or grandparent to a descendant, shall be charged to the descendant, or those claiming through him, in the division and distribution of the undevised estate of the parent or grandparent, and such party shall receive nothing further therefrom, until the other descendants are made proportionately equal with him, according to his descendible and distributable share of the whole estate, real and personal, devised and undevised."

There was nothing, therefore, in the statute of Kentucky, which excluded oral declarations, or prescribed any particular rule of evidence. The decision of the court rests wholly upon the strength of its own reasoning; and that has faults which must fail to commend its adoption. It proves too much for their purpose; for if they should conform their decisions to the exigencies of their logic, they would be forced to hold that advancements could be made only by a last will and testament, in conformity with the statute on wills. They say oral declarations of a parent are inadmissible to give the character of an advancement to a donation of a parent to a child, because it "would be a direct violation of the spirit and meaning of the statute on wills." Concede it. But it is no greater violation of that statute than a written declaration which is not conformed to the statute of wills, or any other act of the parent in making an advancement. The statute itself which prescribes advancements is a violation "of the spirit and meaning of the statute on wills."

Is the statute touching advancements, therefore, inoperative?

If they would reverse the order of their reasoning and make the statute on advancements the starting point, instead of the statute on wills, they would be forced to condemn a will as inadmissible, because it "would be a direct violation of the spirit and meaning of the statute on advancements." The result would be, of course, that they had no mode

whereby a parent could give his property to his children, either while living or after death.

The mistake was, that while construing the statute on advancements they should take the statute on wills as their guide. As the statute on advancements prescribes no rule of evidence, the admissibility of evidence was left to be controlled by general rules; and then, there was no reason why declarations of the parent which were a part of the *res gestæ* were not admissible as evidence. Such seems to have been the rule adopted, except in those States where the statute on advancements prescribed a different rule in that respect.

The chief difficulties touching advancements relate to the character of the evidence which may be allowed to prove the intention of the parties.

The case of *Tillotson v. Race*, in the New York Court of Appeals, 22 N. Y. 122, exhibits facts and circumstances which were held to warrant the admissions of the deceased party in order to fix his intention. It was an action upon a promissory note payable to the alleged donor, and transferred to the plaintiff by the executors of the donor to pay a legacy provided in the will. The defense was, that the testator had discharged the note by the following clause in his will: "I have heretofore actually given and paid to the children or heirs of my deceased daughter, Sabina, all that I intend to give them, and I took their respective notes for the payment of the portion or sum by me advanced to each, which notes I now hold; and I direct my executors to either cancel and destroy said notes, which I declare to be fully paid, satisfied and discharged and released, or else to surrender up said notes to the respective signers thereof to be by them canceled." The defendant was one of the children of Sabina. She left other children. The testator, before making his will, had given to each of the children money and taken their notes, except the defendant; and these notes contained each a provision that the sum was to apply on a certain legacy "willed" by the payee to the maker. The note in suit contained no such provision. The plaintiff relied upon the omission of

this provision as compared with the other notes, to prove that the note was not intended as an advancement. To the same end he proved, by the testator's widow, that the note in suit was given for money lent to the defendant; and that the payee and maker had treated it as the evidence of money loaned. She also testified to a gift of \$900 to defendant by the testator several years before the note was made.

To rebut the force of that evidence, the defendant offered to prove the declarations of the testator, to the effect that the note was intended as evidence of an advancement. The plaintiff objected to this evidence, but the court admitted it. The principal question upon the appeal of the case was, whether this evidence of the declarations was competent in favor of the defendant. It was held competent evidence, and the defense was sustained. The grounds of the decision assigned by the court are, that, by reason of the difference in the phraseology of the note in suit, as compared with the other notes, coupled with the extrinsic evidence that the note in suit was actually given for money loaned, it was made doubtful what was intended. They say: "The rule in such cases is, that a doubt which has been raised by parol testimony may be resolved by the same kind of evidence. It was then competent to prove that the testator considered and treated and talked of this note as one which was not to be paid, but which was held by him simply as evidence of an advancement to the defendant. It was admissible for the purpose of applying the language of the clause in question. It shows what the testator considered to be embraced in the idea of notes taken for money given."

The oral declarations of the parent which were there admitted, were not a part of the *res gestæ* of the note. In other words, they were not made at the time of the making of the note, but at a subsequent time. The decision of the court in this case concedes, impliedly, at least, that the declarations of the parties, except when they are a part of the *res gestæ*, are not admissible as a general rule. They were admitted as an exception to the general rule. If admissible

generally, it would not have been necessary to vindicate their admission under an exception to the rule, created by the ambiguity resulting from subsequent transactions.

It is safe, perhaps, to conclude that the following are the rules upon the point under examination, which are deducible from the reported decisions:

1. Declarations of the parties interested, whether oral or in writing, which are a part of the *res gestæ*, are admissible in evidence to show the character of a donation by a parent to a child, as to the question whether the donation is intended as a gift, a loan or an advancement, except in those States where they have statutes which are construed to exclude oral testimony, of that character.

2. Oral declarations, except when they are part of the *res gestæ*, are not admissible in evidence to determine the character of a donation from parent to child, except when, as in *Tillotson v. Rice*, they are admissible to resolve some ambiguity arising out of subsequent transactions.

SECTION IV.

MATTERS PECULIAR TO ADVANCEMENTS NOT HEREINBEFORE NOTICED.

We have before seen that an advancement is a contract, although peculiar in its character. It is peculiar both in its obligations and in the mode of proof required.

1. The party receiving incurs no obligation to return the property, or to pay therefor. He may or may not bring it into hotchpot on the settlement of the intestate's estate. He may be compelled to do so as a condition to receiving any thing more from the estate. If the share he has received is greater than the portion that will belong to him on the final distribution of the estate, or equal thereto, he has no inducement to bring his portion into collation or hotchpot. In such case he is entitled to neither more nor less than his advancement. If, on bringing his advancement into collation

with the amount of the property left by the intestate, and then dividing the whole sum among those who are entitled thereto, the share allotted to him shall exceed his advancement, he takes the excess over his advancement. If there is only one heir at law or next of kin, any transfer of property by the parent to that one cannot operate as an advancement, but will be an absolute gift. There is, then, no one to whom the obligation of collation can be due.

This view of the subject develops another feature of an advancement. The contract is made between the parent and the child, but the child is under no obligations to the parent. His obligation is due to his co-heirs. Between the parent and himself the transfer is a gift. Between himself and his co-heirs it is an advancement.

Such was held to be the effect in Mississippi, where the administrator of the decedent sought, by petition in the probate court, to make some of the heirs of the intestate account for certain property which had been advanced to them in the life-time of the intestate. The petition was rejected, on the ground that it was a matter wherein the administrator had no interest. It concerned only the co-heirs, not the administrator.

Phillips v. McLaughlin, 26 Miss. 597.

Such is the character and operation of an advancement in all the States alike. Chancellor Kent describes the operation and effect as follows: "If any child of the intestate has been advanced by him by settlement, either out of real or personal property, or both, equal or superior to the amount in value of the share of such child, which would be due from the real and personal estate if no such advancement had been made, then such child and his descendants are excluded from any share in the real and personal estate of the intestate. But if such advancement be not equal, then the child and his descendants are entitled to receive from the real and personal estate sufficient to make up the deficiency and no more."

4 Kent, 418.

But this rule, as to advancements, has been held not to extend to grandchildren who take of the grandfather *per capita*, so as to compel them to account for advancements made to their deceased parents. But when they take by representation, or *per stirpes*, they are compelled to bring advancements which had been made to their deceased parents into hotchpot.

Skinner v. Winne, 2 Jones' Eq. R. 41 ; *Shive v. Brooks*, id. 137.

It has been decided, in New Jersey, that a child who has received an advancement cannot be compelled to pay, on account of it, any thing to the other children.

Gordon v. Barkelow, 2 Halst. Ch. R. 94.

That is a proposition so self-evident, that it is only remarkable that such a question should have been raised. It is no part of the obligations of an advancement to pay any one, or to account therefor for any such purpose. It is merely an arrangement for division of a decedent's property. Those who have received in his life-time must count the amount in, or they cannot share in what is left after his death.

That is the length and breadth of the obligation of the child who has received an advanced portion.

2. Another question, which may sometimes arise, is the valuation or amount of the advancement. Whenever it is brought into collation or hotchpot, it becomes necessary to affix to it some amount as the standard of value.

Whenever the donation has been made in money, the specific sum given is, of course, its standard or measure. If it consisted of property in any other form than in money, then it will become necessary to affix to it a money valuation.

The rule in such cases seems to be as follows: If the parent fixed that valuation at the time of his donation, his valuation is to be taken as conclusive of the amount which is to be affixed to it when it is put in hotchpot. It will not change the amount of the advancement, in such case, that the valuation designated is either below or above the actual

value of the property. This point was so decided in a case before cited for another purpose.

Meeker v. Meeker, 16 Conn. 383.

In that case, there was an offer by the co-heirs to prove the value several hundred dollars greater than the amount designated as the measure of value by the father.

The reason for adhering to the father's valuation, instead of the true value, was given by the court as follows:

"Suppose the property had been, in fact, worth three thousand three hundred dollars, as claimed by the appellees; and the grantor had stated in the deed, or upon his books, that the son was to be charged with the sum of one thousand dollars only, as advanced portion; and all that the property was worth, over and above that sum, was a gift, for which the son was not to be charged in the final settlement of the estate; could there be any doubt as to the amount of the advancement? The testimony in this case leads to the same result.

"The father could not justly charge the son with any sum, by way of advancement, greater than the value of the property; but he might charge him as much less as he pleased. Had there been no evidence as to the intent of the father in making the advancement, the value of the property would be *prima facie* evidence of the amount to be charged. But that intent being shown, governs the amount." But should the father fix the valuation beyond its worth, it is only a gift from the parent, and, if it be accepted, it must be taken with its conditions.

If the value of the property is to constitute the standard of valuation under which it is to go into collation with the property left by the donor, then the time at which to fix the value is the time of the transfer of the property in advancement.

Jackson v. Jackson, 28 Miss. 674; *Hall v. Davis*, 8 Pick. 450.

The rule whereby to determine the valuation of the property advanced, when the donor has not fixed the amount, is established by statute in New York, as follows:

"The value of any real or personal estate, so advanced, shall be deemed to be that, if any, which was acknowledged by the child by an instrument in writing; otherwise, such value shall be estimated according to the worth of the property when given."

1 R. S. 754, § 25.

Such is probably the rule, in that respect, of all the States, whether they have similar statute provisions or not.

It is held to be the rule in Kentucky.

Hook v. Hook, 13 B. Mon. 526.

In the case last cited, it was decided, that, where land is conveyed in advancement, to take effect at a future day, as, for example, at the death of the grantor, the estimate of value must be confined to the time when the donee shall first come into actual and complete possession and enjoyment.

That is a rule, the justness and propriety of which cannot be questioned. The time specified is the time when the property becomes of value to the donee.

3. The amount of the valuation is never, as a general rule, to be increased by any addition of interest thereto.

This was so held in Massachusetts as early as 1821.

Osgood v. Breed's Heirs, 17 Mass. 355.

The advancements had been made, in that case, in money, at different times. The co-heirs claimed that interest should be added to the amounts of principal.

In assigning reasons for disallowing interest, the court said:

"The true notion of an advancement is, a giving by anticipation, the whole, or a part of what is supposed a child will be entitled to on the death of the parent, or party making the advancement. It must, according to our statutes, be proved to have been intended as an advancement, chargeable on the child's share of the estate, by certain evidence prescribed; otherwise, it will be deemed an absolute gift.

"It would, in our opinion, be entirely contrary to the character of an advancement, that it should be viewed in the light of a debt upon interest, as contended by the counsel for the appellant. The very claim in this case proves that such could not have been the intention of parent or child. Fifty-six years elapse from the time of the advancement to the settlement of the estate in the probate office; so that the interest, if allowed, would amount to nearly four times as much as the sum advanced. If this allowance could be made, few children would be willing to take an advancement and run the hazard of having their estates swallowed up by it, as might frequently happen.

"An advancement is usually made with a view to set up the child in business, on the event of marriage. It has never been thought this was a borrowed capital on which interest was to accumulate; and we are confident no case can be found, either in England or in this country, where such a claim has been allowed."

In that case there was, in one view, an appearance of equity, founded upon pretense of equality, growing out of the fact that advances had been made to different children at different times. If the enjoyment of the property was worth any thing, the fact of enjoyment by one longer than by another, might seem, at first view, to demand some allowance, in the way of interest, upon the child who had enjoyed possession the longest, in favor of the others whose usufructuary opportunities had been more limited in duration.

To that view of the question the court, in the case last cited, answered as follows:

"In the case at bar, an appearance of equity has been given to the claim, by setting the advancement of one child against that of the other, and claiming interest only upon the excess in favor of the son. But if the principle is admissible at all, it must apply as well where there is no such set-off as where there is. The parent, in the case before us, well knew the difference between a loan and an advancement, as

is evident from her taking proper security from her son, when she meant to lend money upon interest."

So far as the intimation there made can be regarded as a reason against allowing interest upon an advancement, it cannot be considered very satisfactory. It amounts simply to this, that interest is allowed on loans as a use for the money loaned ; and an advancement is not a loan.

It is true, in regard to an advancement, that there is no loan from the donor to the donee, and no grounds upon which the donor can claim interest of the donee. But that is not the question, nor does it furnish the standpoint from which to view the matter. The question of interest relates only to the matter of equality in the distribution or division of the intestate's property between his heirs at law, after his decease. Now, if equality is equity in that distribution and division, then interest upon the advancements would seem to be proper, where it will promote equality. If there have been advancements to children of different ages, at different times, of sums of money in different amounts, but so graduated that the amounts would be equal on the decease of the parent, if interest was computed on each sum from the time of the donation and added thereto, why is it not equitable in such case that interest should be added to the principal ?

The true rule touching the question is, undoubtedly, to be found in the intention of the donor. If he directs interest to be added to the principal, in order to determine the amount of the advancement, the law must sanction that rule. If he is silent upon the subject, the decisions seem to have disallowed interest, probably upon the ground that the donor did not provide for interest, and, therefore, it must be presumed that it was not his intention to so direct.

There is a case, in the reported decisions of Alabama, where interest was disallowed upon a promissory note which provided for interest, on the accounting for the amount of the note, as so much advanced by the parent to the child.

Krebs v. Krebs, 35 Ala. 293.

In that case, the father had taken from a son a promissory note, for money loaned. Afterward, he arranged to change the loan to an advancement, and that the note should be treated as evidence of an advancement, in the settlement of his estate. It was claimed by the co-heirs that interest upon the note should be added to the amount in order to determine the amount of the advancement. The court denied that interest was allowable.

Interest upon an advancement has also been disallowed in Georgia.

Harris v. Allen, 18 Geo. 177.

And so, also, in Missouri.

Nelson v. Wyan, 21 Mo. 347.

There is a case reported, in North Carolina, where interest was allowed upon an advancement. It was permitted in that case upon the ground that it was necessary to produce equality in the distribution of a particular fund.

Daves v. Haywood, 1 Jones' Eq. 253.

With that exception, all the authorities seem to be opposed to allowing interest on advancements.

The equality which is sought for does not, necessarily, require an equal sum to each child on the death of the parent. That might not result in an equal division. The equality desired is, to start the children in business on an equal footing. They will necessarily differ in ages, and require, therefore, to be started in life at different times. Equality would seem to require a like sum to each at the time of his beginning life for himself. If each was to be charged with interest from the time of the receipt of his share to the time of the death of the parent, or the settlement of his estate, the accumulation of interest would produce inequality, the greater in each case the longer the life of the parent was prolonged. And the inequality would be the greater the greater the difference in the ages of the children. The oldest would take the least and the youngest the most.

Viewed from that standpoint, which may well be the proper one for the consideration of the question of interest upon advancements by the parent to his children, there is an obvious propriety in disallowing interest upon such amounts. We presume that such considerations have controlled the decisions of courts, although we do not find that any such have been assigned as the grounds of judgment.

It has been well said, in some of the cases upon this subject, that interest should not be allowed upon advancements, because then the child would be under very small obligations for favors to the parent. It would be only a loan of money in effect, and he might as well loan money of some other person.

It cannot be denied that it would take from the transfer on the part of the parent the appearance of a gift, to some extent, and change it more to the appearance of a loan.

There is but little, if any, room for doubt, that the decisions of the courts in disallowing interest on advancements, as a general rule, are correct. The reasons given may not all be satisfactory.

4. To constitute an advancement the parent must, in his life-time, have divested himself of all interest in the property in favor of the child.

Crosby v. Covington, 24 Miss. 619.

So far as that point is involved, there can, in principle, be no distinction between an advancement and an unqualified gift; for, as we have before seen, an advancement, as between parent and child, is a gift. The attending qualification which gives it the character of an advancement, imposes on the child only the obligation, under certain circumstances, and for a limited purpose, to account with the co-heirs for the amount of the gift.

The question, in the case here cited, arose in regard to the sum of \$1,300, which it was conceded the son owed to his father at one time. It was claimed that the father had, at a subsequent day, released the debt and changed the

amount to an advancement. That change was denied, on the ground that there was no sufficient evidence of a release of the debt.

5. In order to give effect to an advancement, it is necessary that the parent should die intestate. The reason of the rule is, that if he leaves a will disposing of his property after his death, that constitutes the law of division and distribution of his property. Advancements which he may have made will not be allowed to interfere with his testamentary dispositions. They come in only where there is no testamentary direction as to the property which the decedent may have left.

There has been much dispute in the courts, and some conflict in the decisions, as to the question whether the law in regard to advancements will be enforced in cases where the testator has left a part of his property undisposed of by his will. In some of the cases it has been held, that there could be no bringing into hotchpot where there was a will, even as to property not embraced in the will.

It was held, in New York, that the law as to advancements did not apply where there was a will disposing of part of the decedent's property; that it applied to cases of total intestacy only.

Thompson v. Carmichael, 8 Sandf. Ch. R. 120.

This is stated to be the rule in 1 Abb. N. Y. Dig. 35, where the authorities which have so held are cited.

See, also, *Terry v. Dayton*, 81 Barb. 519.

This question depends wholly upon the phraseology of the statutes of the different States.

There is a case, in North Carolina, which presents the question in its true character.

Jenkins v. Mitchell, 4 Jones' Eq. R. 207.

In that case the father died leaving a will, which was held operative to dispose of his personal property, but inoperative as to the real estate of which he died seised, because he was not the owner of it when the will was made. He had made

advancements to two of his children, of real estate, before his death. The question for the decision of the court was, whether these advancements were to be brought into hotch-pot in the division among his children of the real estate, which they took as his heirs at law. The real estate passed to his heirs by descent, precisely as though he had made no will. But the court decided that the advancements could not be considered, because the statute in regard to advancements only applied "where any person shall die intestate."

The court said: "The intestacy here spoken of must mean a total intestacy, because a partial intestacy as to one and not as to the other would, manifestly, produce the same inequality by the will of the parent as if it were caused by a partial intestacy as to each kind of property."

6. Although advancements are, in one aspect of their character, contracts, they are not contracts within the meaning of the statute of frauds. The statute of frauds does not apply, not because they are not contracts, but because they are not of the class of contracts for which that statute was designed. Marriage is a contract, but not of the class to which the statute of frauds applies. We mention this by way of illustration, that there may be contracts not within the statute of frauds.

There is a case or two reported from the courts of Florida, where there has been an attempt to make out that an advancement was not a contract, from the single circumstance that it was not within the statute of frauds. A moment's reflection will satisfy any lawyer of the fallacy of that mode of argument. Even were it true, as a general rule, that the statute of frauds applies to all classes of contracts alike, it would be a dangerous mode of reasoning to assume that every arrangement to which that statute did not apply was not a contract. There are too many exceptions to general rules in the law to admit, with safety, of that scholastic mode of reasoning. The logic of geometry and of the exact sciences does not belong to the law office or to the judiciary in all its peculiarities.

7. The law of advancements is generally limited to parents and their children and descendants. It seems to be confined to the line of descent in all the States. Heirs of neither the ascending nor of the collateral lines are within the rule.

In some of the States, it reaches only gifts from parents to children. It is so held in North Carolina.

Daves v. Haywood, 1 Jones' Eq. R. 258.

In Virginia there is a case where the law of advancements is held not to embrace gifts to nephews. Bonds given by an uncle to a nephew were held not within the law of advancements, for the want of the required relation of consanguinity.

Lee v. Boak, 11 Grattan, 182.

CHAPTER X.

MATTERS WHICH MAY INTERRUPT OR QUALIFY
THE CANONS OR RULES OF DESCENT.

SECTION I.

ILLEGITIMACY. COMMON LAW RULE AND THE RULES OF THE SEVERAL STATES.

SECTION II.

ALIENAGE. ITS EFFECTS UPON THE ORDER OF SUCCESSION. LAWS OF THE
SEVERAL STATES.

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A DEVISE; WHEN IT DEFEATS THE HEIR AND WHEN NOT.

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SECTION I.

ILLEGITIMACY. COMMON LAW RULE AND THE RULES OF THE
SEVERAL STATES.

The common law rules of descent all presuppose that each individual to be admitted into the line of succession to estates of inheritance was the issue of lawful marriage. The feudal law admitted no others. As a system, it was more rigid and inexorable against children born out of wedlock than either the civil or the ecclesiastical law. The feudal law required

the child to be born after the marriage. It was not necessary to legitimacy that it should be begotten after. Marriage legitimated all children born thereafter, but not those born before. Therein it differed from the civil and ecclesiastical or canon laws. Under the two last named systems, marriage legitimated children born before as well as those born thereafter. Blackstone accounts for the difference in this way: "The reason of our English law is surely much superior to that of the Roman, if we consider the principal end and design of establishing the contract of marriage, taken in a civil light, abstractly from any religious view, which has nothing to do with the legitimacy or illegitimacy of the children. The main end and design of marriage, therefore, being to ascertain and fix upon some certain person to whom the care, the probation, the maintenance, and the education of the children should belong, this end is, undoubtedly, better answered by legitimating all issue born after wedlock than by legitimating all issue of the same parties, even born before wedlock, so as wedlock afterward ensues. 1. Because of the very great uncertainty there will generally be, in the proof that the issue was really begotten by the same man; whereas, by confining the proof to the birth, and not to the begetting, our law has rendered it perfectly certain what child is legitimate, and who is to take care of the child. 2. Because, by the Roman law, a child may be continued a bastard, or made legitimate, at the option of the father and mother, by a marriage *ex post facto*; thereby opening a door to many frauds and partialities which, by our law, are prevented. 3. Because, by those laws, a man may remain a bastard till forty years of age, and then become legitimate by the subsequent marriage of his parents; whereby the main end of marriage, the protection of infants, is totally frustrated. 4. Because this rule of the Roman law admits of no limitations as to the time or number of bastards so to be legitimated; but a dozen of them may, twenty years after their birth, by the subsequent marriage of their parents, be admitted to all the privileges of legitimate children.

This is plainly a great discouragement to the matrimonial state, to which one main inducement is usually not only the desire of having children, but also the desire of procreating lawful heirs."

1 Bl. Com. 455.

The foregoing reasons assigned in favor of the common law practice of legitimating only those children who were born after marriage, as against the more liberal customs of the civil and the canon law of legitimating also children who were born before marriage, apply to all forms of government and all conditions of society. They are reasons of a general ethical and political character, more speculative than practical.

There was another reason in favor of the feudal practice, not presented by Blackstone, which was founded in the political constitution of feudalism, and was peculiar to the feudal organization. The functionaries of the feudal government were intimately associated with the land. A man succeeded to political authority as he succeeded to an estate in land. Men were born to political power just as they were born to their estates. Consequently, any irregularity in the succession to estates in land was equally an irregularity in the distribution of political power. Every thing of a permanent character was made the subject of inheritance; and those who were to inherit were indicated by the law under certain general rules. Marriage was one of those rules. It was a part of the very constitution of government, not merely in a general moral sense, but as an indispensable part of its very organism. As wealth and power came to men only by birth, there could be no regularity or permanency in such acquisitions, except as birth was the result of marriage. Give to birth without marriage the same place and the same rights as were accorded to birth with marriage, not only would society, organized as feudal society was, be utterly broken up, but government would lose all form and stability. There were, therefore, very strong reasons why the feudal law was

more exclusive against children born out of wedlock than any other system of laws.

It will not be seriously claimed that the standard of morals, in feudal society, was higher, or their social habits more refined, than in Roman or ecclesiastical society; or, that the former was more pains-taking in the rearing and education of their children than the latter, as the reasons assigned by Blackstone might be construed to imply. The practical foundation for the distinction existed, as before remarked, only in their different constitutions of government. As the feudal organization left every thing to the chances of birth, it was essential to close the doors against generations born of harlots.

The bastard is denominated in the common law *nullius filius*. That denomination has reference merely to his want of right to inherit from any one. He has no inheritable blood, because the law does not recognize his father, or acknowledge that he has any father. It denies inheritable blood to all persons born out of wedlock. There was no place for them in the feudal compact.

It followed, therefore, that an illegitimate child could not be the stock of descent, except to heirs of his own body; and then only as to estates acquired by purchase, or by being the original lessee. Being *nullius filius*, he could not, in the eyes of the law, have father or mother, brother or sister, or kindred of any other degree, in the collateral line, or in the line of lineal ascent. His only chance of kindred, which could be acknowledged in the law of inheritance, was to be realized, if at all, in his lineal descendants, the issue of lawful marriage; and the only estate to which they could succeed as his heirs, was that of which he acquired title by purchase. Whatever estate could, at common law, descend from a bastard, must descend from him as both the original source of the estate and the original source of heirs. He was never an intermediate receptacle in the line of inheritance, either of the property or of those who were to take from him.

So far such was not only the general rule of the common law, but it was a general rule to which there were no exceptions; and in the States which have adopted the common law, no exceptions to that rule have been allowed except when they have been made by statute. Up to that point, there is no conflict of the authorities.

The points which have been fruitful sources of dispute and litigation relate, first, to marriage; and second, to the question whether certain children were the issue of marriage.

First. We have, in another work, treated of the subject of marriage, as it related to rights of dower and rights by curtesy.

See Bingham on Real Estate, 608 *et seq.*

The much-disputed questions how marriage must be attested, and how it may be proved, are there considered and examined at length. There is no doubt that, to be a valid marriage anywhere, the contract must be made and sanctioned according to the laws of the State where the marriage takes place. Marriage is universally conceded to be a contract within the rule that the *lex loci contractus* governs, and is the standard whereby its validity is to be tested. The condition which it imposes upon the parties thereto is a personal status, that attends them wherever they go. A man and a woman who are made husband and wife in any country, according to the laws of that country, are husband and wife, wherever they may be. That is a general law of civilized society.

The question very naturally arises, as it sometimes has, whether an incestuous marriage, or the marriage of more than one wife, or one husband, even if valid by the laws of the State where made, will be treated as valid in States where marriages of that character are prohibited. The answer must be an unqualified negative. A case of that character would be an exception to the general rule. The rule itself, that the law of the place where the contract was made shall govern the construction and effect of the contract, is founded chiefly on the comity of nations. But that comity

is never extended so far as to sanction what is, of itself, criminal or immoral in its character. Whatever is condemned as void by the universal sentiment of the civilized world, has no claim upon the comity which one nation owes to another. This is especially the rule of Christian countries.

2 Kent's Com. 45 ; 1 Bl. Com. 436 ; Story on Conflict of Laws, §§ 113 a, 114.

Lord Brougham remarked, in *Warrender v. Warrender*, 9 Bligh R. 112, 113, that "marriage is one and the same thing substantially all the Christian world over. Our whole law of marriage assumes this; and it is important to observe, that we regard as wholly a different thing, a different status, from Turkish or other marriages among infidel nations, because we clearly never should recognize the plurality of wives, and consequent validity of second marriages standing the first, which second marriages the laws of those countries authorize and validate.

"This cannot be put upon any rational ground, except our holding the infidel marriage to be something different from the Christian, and our also holding Christian marriage to be the same everywhere. Therefore, all that the courts of one country have to determine is, whether or not the thing called marriage, that known relation of persons, that relation which those courts are acquainted with, and know how to deal with, has been validly contracted in the other country, where the parties professed to bind themselves. If the question is answered in the affirmative, a marriage has been had; the relation has been constituted; and those courts will deal with the rights of the parties under it, according to the principles of the municipal law, which they administer."

This is undoubtedly the true distinction, in conceding to marriage entered into in a foreign country, the respect of the law in all countries. The decisions made in this country, which have extended that degree of respect to what they call marriages made among the wild Indians, which we shall presently examine, have departed from the standard or test of marriage prescribed by Lord Brougham. If there are

any associations among men who have not yet taken the first steps toward government or organized institutions, bearing any resemblance to the institution of marriage, which is doubtful, it will be difficult to find therein the status of husband and wife as recognized in the Christian world.

If the doctrine of Lord Brougham is the correct one, then courts, in passing upon the validity of a marriage alleged to have been made in a foreign country, must not only be convinced that the marriage was celebrated or sanctioned in accordance with the laws of that country, but they must be further satisfied, that what is called marriage there, corresponds, in its substantial features, with the institution which is known and recognized as marriage in Christian countries. They must ascertain that the alleged marriage corresponds substantially in the relations which it institutes, with the marriage which is recognized and practiced by the civilized and Christian nations of the world.

The rule of comity is stated to the same effect, but in different language, by the court, in *Greenwood v. Curtis*, 6 Mass. 377. The subject of that decision was a contract in regard to the purchase of slaves on the coast of Africa; and the particular objection was, the illegality of the contract in Massachusetts. It is said: "By the common law, upon principles of national comity, a contract made in a foreign place, and to be there executed, if valid, by the laws of that place, may be a legitimate ground of action in the courts of this State.

"But that rule of comity is said to be subject to exceptions," which are mentioned. One is, that, "when the giving of legal effect to the contract would exhibit to the citizens of the State an example pernicious and detestable.

"Thus, if a foreign State allows of marriages, incestuous by the law of nature, as between parent and child, such marriage could not be allowed to have any validity here. But marriages not naturally unlawful, but prohibited by the law of one State, and not of another, if celebrated where they are not prohibited, would be holden valid in a State

where they are not allowed. As in this State, a marriage between a man and his deceased wife's sister is lawful, but it is not so in some States. Such a marriage celebrated here would be held valid in any other State, and the parties entitled to the benefits of the matrimonial contract."

In regard to the law of nature and of revelation, Chancellor Kent says, in *Wightman v. Wightman*, 4 Johns Ch. R. 350: "Prohibitions of the natural law are of absolute, uniform and universal obligation. They become rules of the common law, which is founded in the common reason and acknowledged duty of mankind, sanctioned by immemorial usage, and, as such, are clearly binding."

There is, therefore, a point to which the courts of one State or country are not required to go by way of comity, in sanctioning marriages made in another State or country; and that is, when there is any thing in the marriage they are required to pass upon which is contrary to the law of nature, or in, and of itself, criminal or immoral.

There is another case in Massachusetts, in point to illustrate the distinction which is made between things wrong by the laws of nature, or pronounced wrong by the universal sentiment of the christian world, and things which are merely prohibited by the laws of some christian States while they are allowed in others.

Medway v. Needham, 16 Mass. 157.

That case involved the marriage of a mulatto man with a white woman. This was a contest between two towns in regard to the support of paupers. Both parties were residents of Massachusetts, and went into the neighboring State of Rhode Island and were married, where it was lawful for blacks and whites to intermarry. And they went there to be married, because the laws of Massachusetts did not then allow of such intermarriages. The law of the latter State not only prohibited the marriage of negroes and mulattoes with white persons, but expressly declared such marriages void. But yet the court held the marriage valid in Massa-

chusetts, because it was valid in Rhode Island. In assigning reasons for the decision, they place marriage contracts in a class by themselves, distinguished from other contracts, in respect to the point before them, by considerations which do not belong to other contracts.

They say that, "according to the case settled in England by the ecclesiastical court, and recognized by the courts of common law, the marriage is to be held valid or otherwise, according to the laws of the place where it is contracted, although the parties went to the foreign country with an intention to evade the laws of their own. This doctrine is repugnant to the general principles of law relating to contracts; for a fraudulent evasion of the laws of the country, where the parties have their domicile, could not, except in the contract of marriage, be protected under the general principle. Thus, parties intending to make a usurious bargain cannot give validity to a contract in which more than the lawful interest of their country is secured, by passing into another territory, where there may be no restriction of interest, or where it is established at a higher rate, and there executing a contract before agreed upon.

"The exception in favor of marriages so contracted must be founded on principles of policy, with a view to prevent the disastrous consequences to the issue of such marriages, as well as to avoid the public mischief, which would result from the loose state, in which people so situated would live."

It seems to have occurred to the court that they were pushing the doctrine of policy in favor of validating marriages, void by the laws of the State, because the marriage had been made in Rhode Island, to the verge of holding all marriages celebrated in other States and countries, without regard to their character, to be valid in Massachusetts; for they immediately protest against having that broad construction given to their decision, as follows:

"Motives of policy may likewise be admitted into the consideration of the extent to which this exception is to be allowed to operate. If without any restriction, then it

might be that incestuous marriages might be contracted between citizens of a State where they were held unlawful and void, in countries where they were not prohibited; and the parties return to live in defiance of the religion and laws of their own country. But it is not to be inferred from a toleration of marriages, which are prohibited merely on account of political expediency, that others, which would tend to outrage the principles and feelings of all civilized nations, would be countenanced."

There is another case in Massachusetts deciding a like point.

Cambridge v. Lexington, 1 Pick. 508.

That was a case also between two towns in regard to the settlement of paupers. Whether certain children were legitimate, depended upon whether the marriage of their father in New Hampshire was to be regarded as a valid marriage in Massachusetts. The father of the children had been previously married in Massachusetts to another woman, and had been divorced from her by a decree of the court, on her complaint, for adultery committed by him. She was alive at the time of his alleged marriage in New Hampshire.

The court declared it to be "very clear, that, by the laws of this commonwealth, the marriage of the guilty party after a divorce *a vinculo* for the cause of adultery, if contracted within this State, would be unlawful and void."

But it was conceded that the second marriage was valid in New Hampshire. It was denied that the father of the children, if alive and in the State, could enforce any of his marital rights. They say that "it would be competent to the courts here to refuse him, upon the ground that the marriage on which he founded his claim was contracted in violation of the laws of this State, and that it was contrary to good policy, as well as detrimental to the public manners that he should be allowed to enforce such claim; and yet, if his children of the second marriage, after his death, should come here to claim an inheritance from their father, the same strictness is not necessarily to be applied, as the same reason would not to the same extent exist."

subject to all the pains and penalties which the law prescribes against a marriage while a former husband or wife is living; nor shall it authorize the injured party again to contract matrimony within two years from the time of the pronouncing the final decree.

While Benjamin May was living, in 1821, his divorced wife, the petitioner for dower, married again in the State of Tennessee, to the said John Dickson, and continued to reside there until his death. He died seised of land in Tennessee, of which she sought dower.

The children of Dickson by a former wife opposed her proceedings for dower, on the ground that her marriage with their father was void on account of her former marriage in Kentucky.

The case was assumed by the court to possess great political importance, in the principles involved, and was very elaborately examined.

It was said: "Before the divorce of Mary May, had she come to this State and married John Dickson, she would have been guilty of bigamy; for it matters not in what community the first marriage has taken place, or in what form, so that it was legal in the country where it was solemnized; if the second were to take place here, it would be bigamy.

"In every known Christian country polygamy is prohibited, under severe penalties, and marriages encouraged and protected."

Under those considerations, the court held, with an avowed reluctance, as follows:

"1. That Mary May had no husband living, and is not guilty of bigamy by our statute; nor has she violated any penal law of our State.

"2. No principle of comity among neighboring communities can be extended to give force and effect to the penal laws of the one society extritorially of the other."

It should be borne in mind, in regard to the class of cases here referred to, that the foundation upon which they rest is not questioned. The States where the marriages were entered

into, which were alleged to be illegal, were christian States, with Constitutions and laws established and permanent, in entire accordance with the requirements of civilization and christianity; and the marriages in question were made and celebrated in conformity to the established laws of those States, so as to be there valid and lawful marriages. It only remained, therefore, to apply the rule, that a marriage, lawful in the State where consummated, must be treated as valid and lawful in every State and country where civilized and christian institutions constitute their polity of government.

It should be observed that this rule does not apply to alleged marriages entered into where there exist no constitutions or laws of government. The customs and usages of savage tribes furnish no foundation upon which that general rule of nations can rest.

See *Conway v. Beasley*, 8 Haggard, 639; *Story on Conflict of Laws*, §§ 116 a, 117.

From the foregoing authorities it is evident that the rule in regard to marriages, celebrated in a foreign State or country, is, that if they are valid by the laws of the country where the marriage contract is made, they are valid every where; and that no exception exists to the rule only in case the marriage has been made in violation of some great natural or moral law, about which there are no differences of opinion among the christian nations of the world. The reader will not fail to perceive that the class of exceptions may truly be said to be no exceptions at all, practically; for only such marriages as are made in christian countries come within the rule at all; and no violation of the standard moral rules of christianity can be expected to receive sanction in those countries.

It is also evident that the rule of these authorities is based upon a principle or character widely different from the rule founded upon the comity of nations; one which studies to avoid doing injury to innocent offspring, and in doing so is compelled, by the necessity of the case, to respect the guilty and the innocent alike. The guilty widow comes in

for the same respect in the law as her innocent offspring, from the very necessity, that the one cannot suffer the displeasure of the law without exposing the other to the like affliction.

There is a class of cases reported from States bordering on our Indian frontiers, which call for notice in this connection; and which cannot certainly be justified upon any principle of the comity of nations. *Johnson v. Johnson*, 30 Mo. 72, is a case of the class here referred to.

In this case, the widow of J. W. Johnson claimed dower in certain lands. There was no question of her right to dower. The dispute related merely to the quantity or extent of the dower. By the laws of that State, if the deceased husband left lawful issue, his widow was entitled to the use for life of only one-third of the land of which her husband died seised. If he left no lawful issue, she was entitled to dower to the extent of one-half of the estate. In this case the widow claimed one-half. Defense was interposed to the extent of the dower right, that her deceased husband left lawful issue.

It appeared in evidence that the deceased husband had, before his marriage, been an agent, in the employ of the United States government, among the Indians, in a place outside of the limits of any organized State or territory; that, while there, he had formed connection with an Indian woman, the daughter of an Indian chief, named Keokuck, had lived with her for several years, and had three children, the issue of that association; all daughters, named Rosella, Mary and Eliza. He had brought them up, educated them and introduced them to society as his daughters. They had remained members of his household, as his children, until they were married and settled in the world. During all this time they were treated as legitimate children, and, as such, were provided for in his will. He seems to have been a man of wealth and position.

The question was, whether these children of an Indian mother, born in an Indian country, where Indian customs

alone prevailed, were "lawful issue" within the meaning of that phrase, as established by the laws of Missouri. It was held by the court that they were lawful heirs.

It will hardly be claimed that there was much of the comity of nations due to the customs of the wild Indian tribes. Nor will it be an easy task to bring marriage, as practiced among the Indians, within the principle laid down by Lord Brougham, in the case before cited, that to constitute marriage there must be an institution at least resembling marriage, as practiced in christian countries. All such considerations, in a case of that character, must be laid out of view. There is nothing left, in such case, to rely upon, except considerations for the innocent offspring, upon which to base a decision of legitimacy.

The statutes of Missouri seem to have been made, considerably, to relieve the courts from embarrassment in holding such associations to be lawful marriages. They make the question of marriage, which is generally the portal to legitimacy, wholly immaterial, by declaring that "the issue of all marriages decreed null in law shall be legitimate." The court, in the case under review, availed themselves of the provisions of that statute to justify their decision. They nevertheless seem to have felt that something more was wanting to make the justification of their decision complete; and they proceed to lay down platitudes of marriage by the law of nature and the customs of Indians generally, which is certainly next to the law of nature. For all the purposes of the law of marriage, as established among christian nations, they might as well have invoked to their aid the customs of pairing, for the purposes of procreation, among the wild beasts of the forest and the jungle, and the fowls of the air.

The fact, whether these children of an Indian mother were lawful heirs of their alleged father, was submitted to a jury to find, under instructions, as follows: that, "unless the jury find that John W. Johnson and the Indian woman with whom he cohabited, mutually agreed to live their whole lives

together in a state of union as husband and wife, it was not a marriage; nor are the children of such union capable of inheriting from the father."

It is not pretended that there was any evidence in the case which tended to prove that any such agreement was necessarily a part of marriage, as known among the customs of the Indian tribe where this marriage was alleged to have been contracted. This instruction to the jury was, therefore, apparently an effort of the court to ease its conscience by undertaking to make the established doctrines of christian countries lap over upon the customs of the Indians. The jury, as they sometimes have been in other cases, were thus interposed between the court and responsibility, to bear whatever odium there might be in holding a temporary arrangement of cohabitation between a civilized white man and an uncivilized Indian woman, in a country of Indians, to be a marriage in the eyes of the law of a civilized and christian State.

They also undertake to reduce the law of nature, in constituting marriage, to distinctive and defined rules as follows:

They say, "It may be further conceded that, even by the law of nature, a mere casual commerce between the sexes does not constitute marriage. But when there is a cohabitation by consent, for an indefinite period of time for the procreation and bringing up of children, that, in a state of nature, would be marriage; and in the absence of all civil and religious institutions, may safely be presumed to be, as it is termed by some writers, 'a marriage in the sight of God.'"

The tendency of such speculations in regard to the contract of marriage is, to weaken the respect which is due to marriage as an institution of christian and civilized nations. To talk of marriage as an institution of natural laws, is treating the marriage of christian society as subordinated to the rude customs of savages. It is true, that what was there said in regard to marriage by the law of nature was merely a repetition from Shelford on Marriage and Divorce. But

it is idle to seek, in nature, for the laws which shall establish and regulate the artificial institutions of civilized society. The desires and wants of man lead to marriage; but the rules and regulations which establish marriage as an institution of society and govern it in all its incidents and consequences, are artificial regulations of society, designed and fashioned by man. Among civilized nations marriage is a matter of contract between the immediate parties thereto. To say that the terms and provisions of that contract are to be found in natural law is as absurd as to appeal to nature for the laws which regulate other contracts between man and man.

There is another case in the Missouri reports, which carries the law of marriage by nature a step further, by the aid of the statutes of that State.

Buchanan v. Harvey, 35 Mo. 276.

In that case, a white man was the husband of two Indian women of the Blackfeet tribe, and had issue, a child by each. The question was whether they were his lawful heirs. There seems to have been no grounds for dispute, that his relations and cohabitations with both women were perfectly in accordance with the customs of Blackfoot society. But they had a polygamous character which is not sanctioned in civilized, christian society. By the rule of all the authorities such marriages were void, under the laws of civilized society, however valid they may have been regarded among the Blackfoot Indians. But then the statute before referred to applied and made the child of each woman the lawful heir of the white father. The rule of the statute, that the "issue of all marriages deemed null in law shall be legitimate," was sufficiently comprehensive to legitimate both the children, and it was so decided.

There is a case in Alabama where marriage according to Indian customs, assumed to be a valid marriage according to such customs, was respected as a valid marriage by the courts of Alabama.

Wall v. Williamson, 8 Ala. (N. S.) 48.

It was an action against a woman on a promissory note. She defended on the ground that she was a married woman, when the note was made and when the action was commenced, and was not, therefore liable to the action.

She was a woman of Indian extraction, and claimed to have been married to a man of the same blood by the name of David Wall. The marriage was entered into in 1831, in the territory of the Choctaw Indians. They lived together as husband and wife from 1831 to 1839. They were married according to the customs prevailing among the Choctaw Indians.

In regard to the usages and customs of the Indians, it was proved, that men were allowed a plurality of wives, and could marry and dissolve marriage at pleasure. There was no permanency to the relation except what depended on the caprice or pleasure of the man.

The court, in that case, was requested to charge the jury as follows: "That a marriage under the laws and customs of the Choctaws, entered into in a place where such laws and customs are in force, is recognized as a valid marriage by the laws of Alabama, when the same are extended over the territory where the parties so married reside."

The court refused to charge as thus requested, but did charge as follows:

"1. That the living together of an Indian man and woman would not be regarded by the laws of this State, as such a marriage as would affect a contract entered into by the female.

"2. That if the defendant was abandoned by Wall, and she executed the note after he had left her, that she would be bound by her contract, although she might have been married.

"3. That if, according to the customs among the Choctaws, the parties to a marriage can dissolve it at pleasure, by mere separation, and that the defendant and Wall did separate; and hence the defendant was liable on her contract as a *feme sole*."

The jury found a verdict for the plaintiff. The defendant took exceptions to the ruling of the court and appealed. The court above on the appeal reversed the judgment.

On the appeal, the defendant contended "that if this marriage was valid by the laws and usages of the Choctaw tribe of Indians, it is recognized as valid by the laws of Alabama."

The court remarked that "the validity of the marriage, and not the consequences of it, as to the defendant, was, at that time, the subject for instruction."

The court then pronounced for the general rule, that a marriage valid by the laws of the State or country where it is entered into, is valid everywhere, and declared as follows:

"It may, therefore, be considered that the usages and customs of the Choctaw tribe continued as their law, and governed their people at the time when this marriage was had. The consequence is, that if valid by those customs, it is so recognized by our law."

Upon the grounds thus stated, the court held the alleged marriage to be a valid marriage, and the judge below to have been in error, in refusing to charge as requested by the defendant.

As to the alleged dissolution of the marriage, the court held as follows: "It is very clear that the same effect must be given to a dissolution of the marriage by the Choctaw law, as given to the marriage by the same law. By that law, it appears the husband may at pleasure dissolve the relation. His abandonment is evidence that he has done so. We conceive the same effect must be given to this act as would be given to a lawful decree in a civilized community dissolving the marriage. However strange it may appear, at this day, that a marriage may thus easily be dissolved, the Choctaws are scarcely worse than the Romans, who permitted a husband to dismiss his wife for the most frivolous cause."

This case was again tried, and again came before the same court on appeal.

There is a decision of like character in Tennessee.

Morgan v. McGhee, 5 Humph. 18.

In this case, a woman brought an action to recover the possession of certain slaves which she claimed to own. The chief ground of the defense was, that she was a married woman and could not bring action in her own name.

It appeared in evidence that she was a half-blood Cherokee Indian, and had been married to a white man in the Cherokee country, according to the usages and customs of marriage among the Cherokee tribe of Indians. Her husband was then alive.

The court held the marriage valid; and that the plaintiff being a *feme covert* could not maintain the action.

In arriving at that decision, the court reasoned substantially as follows: that as all marriages of a foreign country, consummated in pursuance of the forms and usages of such country, are recognized as valid by the laws of Tennessee, therefore a marriage consummated according to the usages and customs of the Cherokee tribe of Indians, within that portion of the Cherokee country which is within the limits of Tennessee, although before the extension of the laws of Tennessee over it, was valid.

The serious consequences which the court apprehended might follow from deciding otherwise, seem to have had a strong, if not a controlling effect upon the decision. They say, "To hold this marriage void would be to vitiate all the marriages made in the nation, and might be productive of much mischief."

It will be difficult to vindicate this class of decisions, in accordance with the standard of validity which has been established for marriages in christian countries. They lack every element which civilized society requires to constitute marriage. The Indian tribes have no system of laws; no political institutions, and no tribunals to enforce laws, such as civilization recognizes. It will be impossible for a court to find any thing among those tribes which can be truly declared to be the marriage institution of christianity and

civilization. And so long as no such thing can there be found, it is idle to hold that any cohabitation between man and woman there practiced, according to the usages and customs of those tribes, deserves to be treated as a valid marriage in civilized society.

The arrangements called marriages among the Indian tribes, in the cases before cited, certainly lack that permanency which the authorities require as essential to marriage. It seems to be conceded by all the authorities, that to constitute marriage, there must be a contract of an enduring character, as distinguished from a temporary association for the commerce of the sexes.

"The characteristic feature of the marriage contract is its permanency; for although it originates in the will of the parties, yet, after being contracted, the duration of the union is totally independent of the will of the parties."

Shelford on Marriage and Divorce, 3.

The same author holds that that characteristic is necessary to constitute marriage by the law of nature.

Another author defines marriage as "a civil status, existing in one man and one woman, legally united for life, for those civil and social purposes which are founded in the distinction of sex."

Bishop on Marriage and Divorce, § 29.

- The last named author further says of marriage in the same section: "Its source is the law of nature, whence it has flowed into the municipal laws of every civilized country, and into the general law of nations. And since it can exist only in pairs, and since no persons are compelled, but all who are capable are permitted, to assume,—marriage may be said to proceed from a civil contract between one man and one woman of the needful physical and civil capacity. While the contract remains executory, that is, an agreement to marry, it differs in no essential particulars from other civil contracts; and an action for damages may be maintained on a violation of it. But when it becomes executed in what

the law recognizes as a valid marriage, its nature as a contract is merged in the higher nature of the status. And, though the new relation may retain some similitudes to remind us of its origin, the contract does in truth no longer exist; but the parties are governed by the law of husband and wife."

The mistake in assuming any arrangement made among the Indian tribes to be marriage, such as is recognized as the personal status of the parties, among all civilized nations alike, is found in their uncivilized condition. It is absurd to undertake to associate them among the family of nations as having laws and institutions calling for comity and respect. They have no political organization, no institutions of government, no laws, no written language, no pretense of civilized customs and manners; in short, they have no status among the nations of the earth. With no laws of husband and wife among themselves, and no ideas of any such personal status, there is an entire absence of the thing itself, which is known as marriage,—as a married man and a married woman, carrying with them wherever they may go, that relation.

That class of decisions can be vindicated only on the necessities which have resulted from the mingling together of individuals of the two races, the civilized and the savage; not in the modes established among the civilized, but in accordance with savage customs and usages. It may have been very convenient, and, perhaps, desirable, to have treated the associations so formed as within the laws of marriage, and attended by the legal incidents of marriage. But they should have been put upon that ground alone. It is a libel upon the civilized nations of the earth to associate among them the uncivilized Indians of America, as peers in the laws and customs relating to marriage, the most respected, the most zealously-guarded, and the most sacred civil institution known to civilized man. If that class of authorities was carried out to their legitimate end, every savage now wandering on the plains and in the mountains, would hold, in the

eyes of the law, the status of husband or wife; and all would be the lawful issue, in legal estimation, of their fathers, if they could find out who their fathers were.

The question of the validity of an alleged marriage was very elaborately discussed in Connecticut, in *Goshen v. Stonnington*, 4 Conn. 209.

The action was brought by the one town against the other, to recover in assumpsit for support furnished by the one town to paupers who were alleged to have gained a settlement in the other town. The persons supported were a woman and her children. It was a question in dispute whether they had ever gained a legal settlement in Stonnington; and the determination of the dispute depended upon whether the mother of the children was the wife of a certain man. He was conceded to have a legal settlement in Stonnington. And if she was his wife, and the children were the issue of the marriage, the town of Goshen was entitled to recover.

It was in evidence that about fourteen years before the trial, and before the birth of any of the children, the alleged husband and wife were married by a man proved to be an ordained deacon of the Methodist Episcopal Church, a located preacher in the town of Cornwall, and, by the usages and customs of the Methodists, authorized to celebrate marriages.

It seems to have been impliedly conceded, however, at least by the court, that the person who performed the ceremony on that occasion was not authorized to celebrate the marriage ceremony. But the plaintiff contended, and the court held, that, if the ceremony did not constitute a valid marriage, at the time it took place, it was made valid by a statute subsequently enacted, in 1820, the sixth section of which was as follows:

“That all marriages, which have heretofore been performed and celebrated in this State by a magistrate, justice of the peace, or a minister, ordained or qualified, and empowered to celebrate marriages, according to the forms and usages of any religious society or denomination, are hereby declared

to be good and valid to all intents and purposes whatever; any law, custom or usage to the contrary notwithstanding."

The alleged marriage had been celebrated some years before the passage of this act, and the children had then been born, and this account for their support had then been incurred. At that time the mother and children, the paupers, were settled in the town of Goshen. But if this act had the effect to validate the alleged marriage, then it was conceded that it would follow, as an ulterior effect, that the settlement of the paupers was transferred from Goshen to Stonnington, and Goshen was entitled to recover from Stonnington for the support Goshen had before furnished to them.

The verdict in the court below was given for the time, commencing October 8, 1818, to September 9, 1820. This was a period of time all before the statute; and to be sustained by the statute called for a retroaction thereof for the whole amount of the demand.

The court, in construing the statute, decided that this confirmatory act was not merely prospective, but was retroactive by explicit provision or necessary implication, leaving no room for an exclusively prospective application. It not only, by its express terms, imparted validity to marriages before made, but confirmed them to all intents and purposes. There was no ground upon which to contend that the legislature did not intend that the act should have a retrospective operation.

The only question then left against the operation of the act was, whether it was constitutional; that is, whether the legislature had authority to do what they had assumed to do.

It was contended that it was in conflict with the provision of the Constitution of the State, which divided the powers of the government into a legislative department, an executive department, and a judicial department; that the statute in question was an assumption by the legislative department of the powers of the judicial department. The court denied

that construction, and held that the act in question did not purport to pass upon any previous statute, or the validity of any preceding transaction, by way of judicial construction, but purported to give validity to certain proceedings, which were supposed to lack validity before; that, although the act was explicitly retrospective and affected the rights of individuals, it did not authorize the judiciary to pronounce it void, because it was reasonable in its provisions and conducive to the public good. The plaintiff had a verdict, under the direction of the court, and a new trial was denied by the court above.

The theory and principle whereupon this kind of retroactive legislation was sustained by the court was stated by Chief Justice Hosmer, in delivering the opinion of the court, as follows:

“The act of May 20th was intended to quiet controversy and promote the public tranquillity. Many marriages had been celebrated, as was believed, according to the prescriptions of the statute. On a close investigation of the subject, under the prompting scrutiny of interest, it was made to appear that there had been an honest misconstruction of the law; that many unions, which were considered as matrimonial, were really meretricious; and that the settlement of children, in great numbers, was not in the towns of which their fathers were inhabitants, but in different places. To furnish a remedy co-extensive with the mischief, the legislature have passed an act confirming the matrimonial engagements supposed to have been formed, and giving to them validity, as if the existing law had precisely been observed. The act intrinsically imports that the legislature considered the law of 1820 to be conformable to justice and within the sphere of their authority. It was no violation of the Constitution; it was not a novelty, such exercise of power having been frequent, and the subject of universal acquiescence; and no injustice can arise from having given legal efficacy to voluntary engagements and from accompanying them with the consequences which they always import.”

In another part of the opinion he says: "I believe no person will deny that the exercise of legislative authority, merely, and without further consequences, to confirm marriages not duly celebrated, is valid, although clearly retrospective and manifestly operating on the rights of individuals."

According to the doctrine of this case, any present agreement to marry, entered into between two persons who have the requisite physical and mental capacity for the status of husband and wife, although it may not be attended with the ceremonies required to constitute a valid marriage by the laws of the State where the agreement is made, could be validated by after legislation.

This is put upon the same principle of legislation declaring the official acts of a public officer, who has acted before he was legally qualified, to be valid as though he had been qualified; or of an act which confirms or extends the existence of a corporation otherwise defunct; or of any other of that class of acts generally distinguished as confirmatory acts.

In the case of *The City of Bridgeport v. Housatonic Railroad Co.*, 15 Conn. 496, this kind of legislation was spoken of as follows: "The end of all confirmatory laws, so far as they are intended to be retroactive, is to set up and give original effect to acts before void or inoperative. Such was the object, and such the effect of our statute of 1820, confirming *void marriages*."

"And such, also, for many years, has been annually true of the resolves of the General Assembly confirming the void acts of the assessors and boards of relief in making out the tax lists of the towns."

The constitutionality of this class of legislation is abundantly sustained by the adjudicated cases.

In the case of *Wilkinson v. Leland*, 2 Peters, 627, the Supreme Court of the United States affirmed the constitutionality of an act of Rhode Island confirming and making valid a previous sale and conveyance of land in that State, made by an executrix for the payment of the debts of the

testator, under an order of a probate court in New Hampshire.

The cases are numerous, which hold the same doctrine.

See *Calder v. Bull*, 3 Dallas, 386; *Foster v. The Essex Bank*, 16 Mass. 243; *Mather v. Chapman*, 6 Conn. 54; *Beach v. Walker*, id. 190.

Second. Thus far, on the subject of marriage, we have only treated of what is necessary to constitute marriage. It remains to consider how marriage may be proved, as required to establish the legitimacy of children. We have, in the work on Real Estate before referred to, examined both the question of marriage and its required proof, at some length, and do not intend to repeat therefrom.

The question of the legitimacy of children presents the question of marriage in a manner somewhat different, not in principle, but in the facts and circumstances that may be used to prove marriage, from questions of dower and curtesy.

Upon this branch of the subject, there is a very instructive case reported in 4 Bradford's R. 28, *Ferrie v. The Public Administrator*.

The case is also reported from the New York Court of Appeals, under the title of *Caujolle v. Ferrie*, 23 N. Y. 90.

There is presented in that case almost every form of evidence of legitimacy of children, tending to prove birth in wedlock, which it is possible to be presented or conceived of. The discussions of counsel, and of the respective courts, are very elaborate and learned.

The evidence in the case was made up of reputation and circumstances of every conceivable form and variety.

Reputation of chastity; reputation of want of chastity; reputation of marriage; reputation of no marriage; hearsay that the child was a bastard; hearsay that it was not a bastard; opinions of witnesses that the woman was married; opinions that she was not married; that a witness had never heard reproach against the chastity of the woman; that he had heard such reproach; that she was the mother of the

child; that she was not the mother of the child; that she had sought for her child in America; that she had made no such search; that she, on some particular occasion, spoke of her child; that she never spoke of her child; were all made matters of evidence before the surrogate, in that case, touching the legitimacy or illegitimacy of the child.

The statements of the mother, that she was married in the United States; that the husband of the child had sent her to get this child, and that she and her husband knew that the child was theirs, were made matter of evidence in the issue of legitimacy.

Stories as to the woman having had a child by the husband at a certain time, and statements that she had no such child, were admitted in evidence. The facts and circumstances thus inquired after had occurred or taken place, some of them, a half century before the testimony was taken.

The general rules by which circumstantial testimony touching the legitimacy of children is to be estimated or tested, are *sui generis*, according to all the decisions. Thus, in the case of *Ferrie v. The Public Administrator*, it was said by the surrogate, referring to the case of *Piers v. Piers*, in the house of Lords, of England, that "the principle established in this case was, that the question of the validity of a marriage cannot be tried like any question of fact which is independent of presumption, for the reason that the law presumes strongly in favor of marriage, particularly after the lapse of a great length of time. The court seemed to adopt the doctrine laid down by Lord Lyndhurst, in *Morris v. Davies*, 5 Cl. & Fin. 163, that 'the presumption of law is not lightly to be repelled, it is not to be broken in upon, or shaken by a mere balance of probability, the evidence for the purpose of repelling it must be strong, distinct, satisfactory and conclusive.' Or, as Lord Cottenham stated the proposition, 'a presumption of this sort in favor of a marriage can only be negatived by disproving every reasonable possibility, — you should negative every reasonable possibility.'"

It must be conceded, that the rule thus generally expressed is somewhat difficult of appreciation and application to the actual trial of such an issue. When an issue of fact is to be determined by a jury, or otherwise, as to whether there was a marriage between two persons, at or before a particular time, or before a particular event, as, for example, before the birth of a child, it is not necessary to prove by direct testimony, the celebration of the marriage. It is not required that there shall be an official certificate of the marriage, or the testimony of persons who were present and witnessed the ceremony. It is sufficient to prove facts and circumstances from which it may be reasonably inferred that there was a marriage. Proof of cohabitation as husband and wife, that such relation was acknowledged by the persons claiming to have been married, and by their families and friends, and any other circumstances from which marriage may be reasonably inferred, are legitimate evidence of marriage. And when the evidence convinces the mind that there had been a marriage, it should be so found. It is true marriage is presumed and legitimacy is presumed from certain facts and circumstances. But the facts and circumstances upon which the presumptions are to rest must be proved before the presumptions can arise. Then, the presumptions can be repelled by direct evidence, showing that there was no marriage.

It is true, also, that the law is allowed to be more sensitive to presumptions in favor of marriage, when the legitimacy of children is the question to be determined, than in the determination of any other question. The learned surrogate of the county of New York has stated the rule upon this subject, as follows: "The presumption thus charitably entertained by the law in favor of marriage operates with the greatest force when children alone are interested. In such cases it has not been customary in the ecclesiastical courts of England to require such strict proof as would be demanded were the parents living. The children, at least, are innocent, if there has been any irregularity. They have not the same means

of knowledge which were possessed by the parties in chief; objections which the parents might readily have answered; suspicious and mysterious circumstances which they possibly could have cleared up and explained, the children may be utterly unable to solve or elucidate; and the same inferences ought not to be drawn from their failure to do so, as might with propriety be deduced against the parents."

He then quotes, approvingly, from Sir William Scott, as follows: "It is certain, that the illegitimacy of a child may be proved by probable evidence, perhaps by reputation only; but then the reputation must be clear and undoubted; it must be uniform, for, if a reputation has existed both ways, the conclusion would be in favor of the marriage."

The principles which are to control in such cases are declared by the surrogate as follows: "It is an established maxim that the presumption is always in favor of marriage. There are certain legal rules in relation to presumptive evidence which are approved by reason, sound policy, the common sense of mankind, and for the honor of jurisprudence, I may add, charity. They are not accidental rules, but have their basis laid broad and deep in the immutable principles of morality and equity, and their observance is largely conducive to the order, happiness, and welfare of society. There are also degrees in the weight or force of different presumptions; and here again the law is not so cold, nor so regardless of humanity, as to reject with stoicism the claims of charity and the appeals of helpless orphanage."

4 Bradford's Rep. 84.

In *Caujolle v. Ferrie*, 23 N. Y. 106, 107, it was declared in regard to proof of marriage, that "strict proof is only required in prosecutions for bigamy, and in actions for criminal conversation. A marriage may be proven in other cases from cohabitation, reputation, acknowledgment of the parties, reception in the family, and other circumstances from which marriage may be inferred."

In *Starr v. Peck*, 1 Hill, 270, there was a single question presented to the jury to find, namely: whether the person under whom the defendant claimed to succeed was a legitimate child.

It was conceded that the land in question formerly belonged to one Samuel Starr. The plaintiffs claimed to make title as heirs at law of Chauncey Starr, deceased, a son of the said Samuel Starr. The title of the plaintiffs to one-half was admitted by the defendant.

The defendant owned the right of one Abby Peck, a deceased daughter of the said Samuel Starr by Sarah Barnes, to whom Samuel Starr was married, and who was the mother of Chauncey Starr, the father of the plaintiffs. The plaintiffs denied the defendant's title on the ground that Abby Peck was illegitimate, by reason of her birth before the marriage of her father and mother, the said Samuel Starr and Sarah Barnes.

It appeared by the evidence on the trial, that the said Samuel and Sarah were formally married by a clergyman in Connecticut more than fifty years before the trial. At the time of the trial both were dead, but it was shown that they had cohabited as husband and wife until they were separated by death. The said Abby and Chauncey were admitted to be their children, but Abby was born ten days before the marriage. Samuel had visited Sarah by way of courtship for a year before the marriage. He was a sailor, and was absent at sea when Abby was born. Abby was brought up by them as their child, and was always treated as such.

It seems to have been conceded, that, if Abby was born before the marriage, she was illegitimate and could not have succeeded to her father as his heir. But the judge left it to the jury to find, whether there had not been a marriage in fact before the said formal ceremony, and before the said Samuel last went to sea. And the jury found a verdict for the defendant. The plaintiffs moved for a new trial, on the ground that the verdict was unsustained by the evidence.

It was conceded by the court, that there was "no direct evidence of any marriage" before the marriage ceremony. But a new trial was denied by the court. And the decision was placed upon the grounds, that the facts and circumstances, proved to have existed, were sufficient to authorize the jury in finding a marriage in fact between the father and mother before the birth of the child. The circumstances relied upon were, the fact of an agreement to marry previously, the treating of the child as legitimate by the parents, and their living together, as husband and wife, as long as both lived. It was also said, that in addition, there was "the presumption that the parties would not indulge in a connection which was immoral, not to say criminal, especially when they might, themselves alone, have rendered it innocent, by a marriage contract *per verba de presenti*. We are to presume against a notorious act of immorality almost as strongly as we would against the commission of a legal crime."

Upon considerations of that character, the court expressed their conclusion to sustain the verdict of the jury as follows: "Secret cohabitation, pregnancy and birth, followed by immediate solemnization and public cohabitation for life, would seem to furnish considerable evidence that the parties had agreed, before that connection which resulted in pregnancy, to consider themselves as married in fact. The case bears no feature of heartless prostitution. The proofs are plain, that the object of both parties was marriage; and it seems not at all extravagant to presume, in favor of the female at least, that before submitting to a connection she must otherwise have considered criminal in the highest degree, she would have required such a form of contract as to change its character. Nothing appears in the case, leading one to suppose that her husband would have hesitated in making such a contract; and that it was not publicly acknowledged and solemnized before the birth of the child, may be set down as the result of his accidental detention at sea, for a considerable longer time than the regular course of his voyage required."

This would seem to be an extreme case in favor of the presumption of legitimacy of children. If to be taken as presenting the true doctrine, it would be difficult to prove illegitimacy, where the parents had been married, and cohabited as husband and wife for a life-time, and where the child had always lived with them and been educated and cared for as legitimate; and especially, after a long lapse of time and the death of the parents. The formal, ceremonial marriage in that case was regarded as evidence against the legitimacy of the child, and could not favor it, for her birth was conceded to precede that ceremony. It would have been less difficult to presume marriage in fact at an earlier day, in case there had been no formal ceremony thereafter. That case, therefore, in its principles and rules, embraces all cases of the children of parents who cohabit as husband and wife, and treat the children as legitimate; and particularly, all cases where parents have been for a long time dead, and the only evidence of marriage of the parents and legitimacy of the children is made up of the facts and circumstances that the parents have lived together as husband and wife, and have brought up the children as the legitimate issue of such connection.

The doctrine of that case seems to have been generally adopted both in this country and in England. In all civil actions and proceedings marriage is subject to proof by the proof of facts and circumstances from which the marriage itself may be reasonably inferred. And when it becomes necessary to prove the marriage of parties long since deceased, in order to establish the legitimacy of their descendants, that kind of evidence is generally all that the parties can be expected to produce. Even where there may be record evidence, or an authorized certificate of marriage, there will still be evidence wanting to make the proof complete, in addition to the official record or the official certificate, which cannot always be supplied by the evidence of persons who may have been present at the marriage. Then, there must necessarily be a resort to circumstantial evidence,

and to proof of facts from which the identity of the parties and the marriage itself may be inferred.

This was so decided in an action for criminal conversation, where it was held necessary to prove the marriage itself by direct evidence. The point made was, that the identity of the parties could be proved only by the attesting witnesses of the marriage.

Birt v. Barlow, Douglass, 171.

In that case Lord Mansfield stated the rule of evidence as to marriages as follows :

"Registers are in the nature of records, and need not be produced, nor proved by subscribing witnesses. A copy is sufficient, and is proof of a marriage in fact between two parties describing themselves by such and such names and places of abode, though it does not prove the identity. An action for criminal conversation is the only civil case where it is necessary to prove an actual marriage. In other cases, cohabitation, reputation, etc., are equally sufficient since the marriage act as before. But an action for criminal conversation has a mixture of penal prosecution ; for which reason, and because it might be turned to bad purposes by persons giving the name and character of wife to women to whom they are not married, it struck me, in the case of *Morris v. Miller*, that, in such an action, a marriage in fact must be proved. I say, a marriage in *fact*, because marriages are not always registered. There are marriages among particular sorts of dissenters, where the proof by a register would be impossible ; and Dennison, *Justice*, in a case of that kind which came before him, admitted other proof of an actual marriage. But, as to the proof of identity, whatever is sufficient to satisfy a jury is good evidence. If neither the minister, nor the clerk, nor any of the subscribing witnesses, were acquainted with the married couple, in such a case, none of them might be able to prove the identity. But it may be proved in a thousand other ways. Suppose the bell-ringers were called, and proved that they rung the bells, and

came immediately after the marriage, and were paid by the parties; suppose the handwriting of the parties were proved; suppose persons called who were present at the wedding dinner, etc., etc."

Buller, J., in the same case puts another mode of proving the identity of the parties married, by way of illustration. He said: "In this case the wife's maiden name was Harriet Champneys. Suppose a maid servant had proved that she always went by that name till the day of the marriage; that she went out that day, and, on her return, and ever since, was called Mrs. Birt; surely that would have been evidence of the identity."

We have quoted the rule and the illustrations as given in that case, because the rule exists in this country, the same as there stated, and the illustrations are suggestive of what the lawyer requires in order to understand the rule itself and its practical application.

The rule there stated is the one generally adopted by the text-writers.

1 Greenleaf on Evidence, § 107; 1 Phillips' Ev. 410; 2 Starkie's Ev. 931, 932.

There are two cases in New York, decided by the chancellor, since 1840, which fully carry into practice the rules proclaimed by Lord Mansfield in *Birt v. Barlow*.

Rose v. Clark, 8 Paige, 574; In the matter of Taylor, 9 id. 611.

In *Rose v. Clark*, the case originated before the surrogate of Rensselaer county, resulting in his decree, declaring that one Abigail Rose, the widow of John Rose, and the intestate of the respondent in the case, was entitled to one-third of the personal estate of the said John Rose deceased. The question turned upon the point whether Abigail Rose was ever the lawful wife of John Rose.

The facts touching that point were as follows: The maiden name of Mrs. Rose was Abigail Roberts. Fifty years before the decision of the surrogate, she married Jonas Frink, and lived with him a short time; when Frink mar-

ried another woman, moved to Massachusetts and resided there several years; but finally came back to Rensselaer county, and died there in the poor-house in 1830.

Ten years after Frink left her, Mrs. Rose was living with one Owens as his housekeeper; and was there married to S. Thurston, who left her the next day. She then continued to live with Owens as his wife until he died in 1826. Two or three years thereafter she was married to Rose, and she and Rose resided together as husband and wife until the death of Rose, in January, 1838. Both Rose and his wife sustained fair characters; and he frequently recognized her as his wife after the death of Frink. In 1831, they made a deed of lands, wherein she was described as his wife. She was recognized as his wife by the children of Rose by a former wife.

The surrogate held, that the marriage of Rose during Frink's life was void; but that the facts and circumstances proved were sufficient to warrant the inference of an actual marriage after the death of Frink. Upon appeal the chancellor affirmed the decree.

The grounds of affirmance by the chancellor were the same as taken by the surrogate; that the facts and circumstances were sufficient to authorize the inference of marriage of Rose after the death of Frink. He said: "That an actual marriage may be inferred, in ordinary cases, from cohabitation, acknowledgments of the parties, etc., as well as by positive proof of the fact, there can be no room to doubt, and the only doubt in this case arises from the proof of the fact that the matrimonial cohabitation between these parties commenced previous to the death of the first husband, under a contract of marriage which was absolutely void previous to the Revised Statutes; although neither of them may have known at that time that Frink was still living. It appears, however, from decisions in our own courts, as well as in England, that a subsequent marriage may be inferred from acts of recognition, continued matrimonial cohabitation and general reputation; even where the

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parties originally came together under a void contract of marriage."

In the matter of Taylor, a lunatic, 9 Paige, 611, the proof of marriage was held to be made out from facts and circumstances. The leading facts of the case are stated in the head-notes of the reporter, as follows:

"Where a gentleman introduced a female, who was previously living with him as his housekeeper, to his friends as his wife, and from that time, for the period of eleven years, continued to cohabit with her as his wife, holding her out to the world as sustaining that relation to him, and had several children by her, who were called by his name,—*Held*, that these facts were sufficient to authorize a court or jury to presume an actual marriage between the parties, by a contract *in presenti*, at the commencement of such matrimonial cohabitation."

The chancellor, in assigning the reasons of his decision, said: "It is evident, from the testimony, that Taylor introduced that young woman, who then resided in his family, to some of his friends as Mrs. Taylor, about a year subsequent to the death of his first wife; that at the expiration of about the ordinary period of gestation thereafter her first-born child was born; and that, for the period of eleven years subsequent to that event, he continued to cohabit with her as his wife, and to hold her out to the world as sustaining that honorable relation to him. These facts alone would be sufficient to authorize any court or jury to presume an actual marriage between the parties, by a contract *in presenti*, in the summer or fall of 1804, and that her intercourse with him was connubial and not meretricious subsequent to that period; even if there was reason to believe that an illicit connection had before existed between them."

As to the evidence which bore directly on the legitimacy of the children and only indirectly on the evidence of marriage, he further remarked as follows:

"And when, in addition to this, we take into consideration the other facts in the case, I think no one can doubt that

there had been an actual and legal marriage between the parties previous to the birth of any of the children whose legitimacy is now attempted to be called in question by some of their sisters of the half-blood. It appears by the family record kept by Taylor, previous to his departure for England in 1816, that he entered the names of the four children of the second wife, who had then been born, in such record, with his own hand, in the same manner as he had therein-before recorded the names of the children of the first marriage; except that those were entered therein as his children by Mary Barker — which was the maiden name of his first wife. It is also proved, by many witnesses, that all the children of the first marriage, even after they had arrived at womanhood, continued to recognize the second Mrs. Taylor as the lawful wife of their father; respecting and treating her as such, and calling her at all times by the familiar title of 'ma,' as well after as before his departure for England. That fact is wholly inconsistent with the supposition that either of them believed she sustained any other than that honorable relation to him and them."

There is another feature of this case, touching evidence of reputation and declarations of parties, which deserves to be borne in mind. While discussing the character and effect of other parts of the testimony, the chancellor said :

"General reputation as to the character of the intercourse between these parties, created by the stories which had been set afloat about the time of the writing of the letter of July, 1822, was not legal evidence to rebut the presumption of the marriage arising from other facts in the case. As it was not a part of the *res gestæ*, it could not be legally used for the purpose of giving a character to the cohabitation which had terminated many years before. For the same reason, declarations or admissions of Mr. or Mrs. Taylor, made subsequent to that time, could not be legal evidence upon the question of the legitimacy of the children who were born while their parents lived together, and were holding themselves out to the world as husband and wife. Declarations of parties, and

other attending circumstances, in order to render them admissible in evidence as part of the *res gestæ*, must be contemporaneous with the main fact under consideration, and to which they are intended to give character. Thus, if a man and woman are cohabiting together, and the question to be decided is, whether the character of her intercourse with him is matrimonial or meretricious, the declarations of the parties during the existence of such intercourse, the fact of their appearing in public with each other as husband and wife, of their visiting in respectable families, and of their being treated by their acquaintances and spoken of by them as sustaining that relation to each other, constitute a part of the *res gestæ*, showing the character of that intercourse to be matrimonial and virtuous. And cotemporaneous declarations and attending circumstances of a different character, would be legal evidence from which the conclusion might legitimately be drawn, that the intercourse between the parties was illicit and dishonorable."

There can be no question that the principles there pronounced by the chancellor constitute the true standard by which evidence to the issue of marriage, or to the issue of the legitimacy of children, is to be tested; and they comprehend, in the scope to which they may be applied, the whole field of evidence which either issue may include.

The doctrine of those cases has been the doctrine of like cases in this country, whenever the validity of marriage, or the legitimacy of children has come in question.

The questions of marriage, the proof of marriage, and the legitimacy of children, were elaborately considered in a recent decision of the supreme court of the United States.

Blackburn v. Crawford, 8 Wallace, 175.

The action related to the lands of an intestate who left no descendants, but did leave kindred in the collateral line; on the one hand of the name of Blackburn, confessedly his cousin-german, and on the other nephews and nieces, children of a brother, Thomas B. Crawford, who had died before him. The

legitimacy of these nephews and nieces was denied by the Blackburns, on the ground, as alleged, that their mother had been the mistress, not the wife, of their father.

It was conceded that the intercourse of the father and mother had at first been meretricious; but it was contended by their children that a marriage had subsequently taken place. Whether there had or had not been a marriage was left as a question of fact for the jury. They found a marriage. The court above reversed the judgment with an order for a *venire de novo*, on the ground of errors in the instructions of the court below, to the jury.

The mother was sworn as a witness on the trial, and testified to a formal marriage after the birth of two of her children, but before the birth of the other two. She further testified that a sister of hers was present as a witness of the marriage, but had since died. The declarations of that sister were proved under objection, and were decided to have been erroneously admitted, because the deceased sister was not related by blood or marriage to the intestate. They held to the rule as stated in 1 Greenleaf on Evidence, § 103, that to authorize the admission as evidence of the declarations of deceased persons, the deceased persons must be shown to be "related by blood or marriage to the person, and, therefore, interested in the succession in question."

There was also another piece of evidence which was held to have been improperly excluded in the court below; and that was the statements of the intestate made to his attorney, touching his directions for the draft of his will, wherein he denied the alleged marriage. The court decided that this testimony should have been admitted.

The court below was held to have erred, also, in submitting to the jury to find whether there had not been a marriage between the father and mother of the children in question, at a time and place different from the time and place testified to by the mother. They based this point of the decision upon the testimony of the mother. In treating of her testimony they say that it was "clear and positive. It was wholly incon-

sistent with such a proposition. If there were none, as alleged by her, clearly there was none at any time."

This is the most important point of the decision, because it might be made to appear in conflict with many of the previous decisions, some of which we have noticed.

They treated her testimony as conclusive against marriage at any other time or place than the time and place testified to by her; while at the same time they denied to her evidence the effect of proving marriage then. They gave it no effect, except to render the submission of the question of marriage at any other time, with the instruction that "the presumption of law was in favor of the legitimacy of the children," erroneous. It was erroneous, they say, because, "under such circumstances, the law makes no presumption. The question to be determined was one of fact, not of law. The facts referred to were a part of the evidence. They were to be weighed against the countervailing evidence. They might, by possibility, all be true, and yet no marriage have occurred, and the children all be illegitimate."

There can be no doubt, that when the evidence affords no grounds to infer a marriage, it would be error to submit the finding of marriage to the jury. But, in this case, there was evidence from which marriage was inferable; and evidence of a character similar to what has been submitted to jurors in like cases, where they have found marriage, and where their verdict has been sustained upon a review of the evidence, in the appellate court. The father and mother had cohabited as husband and wife, had reared and educated a family of children as their own; had continued to cohabit and form a household as husband and wife, and as the father and mother of their own offspring until the death of the husband and father. There was in those facts and circumstances evidence of marriage, which, in all other cases, has been held proper to be submitted to a jury from which to find lawful marriage.

It is a noticeable feature of the decision, that the court does not deny the rule of other cases; and, apparently, had the mother not been sworn at all, and had there been no

other evidence of marriage at a particular time or place, the other facts and circumstances which appeared in the case would have been regarded proper evidence to submit to the jury to find therefrom the marriage of the father and mother, and the legitimacy of their children.

There was nothing in the way of that theory, in the view taken by the court, except the testimony of the mother, of a formal, ceremonial marriage at a particular time and place. This was treated by the court as disproving all evidence of marriage at any other time and place, and yet as not proving marriage at the time and place. In other words, the testimony was treated as entitled to credit and force enough to disprove marriage at any other time, but as lacking credit and force to establish marriage at that time.

The court thus came to this singular conclusion, that the mother, by testifying to marriage with a view to establish the legitimacy of her children, actually bastardized them by thus disproving marriage at another time and place indicated by other evidence.

No other case has ever so construed evidence of marriage at a particular time, as to disprove evidence of marriage at another time. So far the decision is an innovation upon the practice which has been sanctioned by the courts for at least two centuries. But it cannot be claimed to overrule those decisions, for it alleged no such result for itself. It assumed for itself a character *sui generis*; and prescribed no general rule of universal application.

This case appears to be in conflict with the case of *Patterson v. Gaines*, in the same court, in its doctrines and principles. See 6 How. U. S. 589, *et seq.* And certainly it is a departure from the course of the decision in *Caujolle v. Ferrie*, 23 N. Y. 90, and the other cases in the New York courts, which we have hereinbefore examined.

When the marriage of the father and mother is once proved, the law presumes the legitimacy of all children born thereafter. In such case, neither of the parents can be allowed to testify that the child is illegitimate.

There is an early English case upon this subject, establishing the rule that seems to have always remained unchanged.

Goodright v. Moss, Cowper, 591.

The action was ejectment for two pieces of land. The lessor of the plaintiff claimed to be entitled to the premises as cousin and heir at law of Ann Stevens, who died seised. The only question was whether the claimant was the legitimate son of Francis and Mary Stevens; and whether he was so or not, depended upon the fact whether he was born before their marriage. There was a register of both the marriage and of the birth, which made the birth a year later than the marriage.

The defendant insisted that the claimant was actually born before the marriage, but that there was a public baptism after the marriage, which accounted for the registry of the birth thereafter.

To prove the birth before the marriage, the defendant offered to prove the declarations of both father and mother to that effect. They also offered evidence of a general reputation in the neighborhood, of birth before marriage.

The defendant also offered in evidence the answer of the mother to a bill in the court of chancery, wherein she declared the claimant illegitimate, because he was born before marriage. All this evidence was ruled out, and the plaintiff had a verdict, subject to the opinion of the court.

It was insisted that neither the personal testimony of the parents, nor their declarations, could be admitted in evidence to bastardize their issue; to which point they cited a great number of cases.

Lord Mansfield, in delivering the opinion, held that there must be a new trial for the error of rejecting all the evidence that was offered. He thus states the questions: "The questions have been made, 1st. Whether the father and mother could have been examined, if alive. 2d. If they could, whether their declarations, though ever so solemn, can be admitted as evidence after their death."

As to the first question he then cites several cases where the mother's testimony as to the marriage has been admitted. He then says: "As to the *time of the birth* the father and mother are the most proper witnesses to prove it. But it is a rule, founded in decency, morality and policy, that they shall not be permitted to say after marriage that they have had *no connection*, and, therefore, that the offspring is spurious; more especially the mother, who is the offending party."

As to the second question, "whether the declarations of the father and mother in their life-time can be admitted in evidence after their death; tradition is sufficient in point of pedigree; circumstances may be proved. For instance, suppose from the hour of one child's birth to the death of its parent it had always been treated as illegitimate, and another introduced and considered as the heir of the family; that would be good evidence. An entry in a father's family Bible, an inscription on a tombstone, a pedigree hung up in the family mansion, are all good evidence; so the declarations of parents in their life-time. I have known advice given to a father and mother to make attested declarations in writing, under their hand, of the precise time of the birth of the bastard *eigne* and the subsequent marriage, to prevent controversy in the family touching the inheritance. If the credit of such declarations is impeached, it must be left to the jury to judge of."

In a recent case in Iowa, the rule as to the admissibility of the declarations of the parents touching the legitimacy of their children, has been thus stated: "The declaration of a husband and wife are not competent to establish the illegitimacy of a child begotten and born during wedlock; but the declarations of a mother and putative father are admissible for the purpose of showing that they were never lawfully married."

Niles v. Sprague, 18 Iowa, 198.

But the testimony was admitted in that case under peculiar circumstances. In the language of the opinion: "The case is not, therefore, where parties have lived together for years,

treating each other as husband and wife, and where, afterward, it is sought to bastardize their issue, by proving their declarations that they were never lawfully married. The child was begotten before, but born after the alleged marriage. The question to be determined is one of inheritance. If there was a marriage, as claimed by plaintiffs, then the presumption is that Sandford was the father of Linus. But it is a presumption that is not conclusive, and which it is entirely competent to rebut. To obtain a predicate upon which to base this presumption, it was essential to establish the marriage. And we can see no reason, as bearing upon the pivotal point, why the declarations of the mother and putative father, made about and after the birth of the child are not receivable, even if the effect should be to show the illegitimacy."

In that case, the parties had never lived together as husband and wife. The rule, as held there, seems to differ in no substantial respect from the rule as laid down by Lord Mansfield, in *Goodright v. Moss*. Where the evidence of marriage is conclusive, the declarations of either husband or wife that they were not married, would clearly be inadmissible. And even in a case where there was no direct evidence of marriage, beyond the proof that the parties cohabited as husband and wife, and had done so during a long life-time, it would seem absurd to admit in evidence, especially after they were dead, declarations of either that they were not married, for the purpose of bastardizing their children. If such evidence were held admissible at all, it would be entitled to very little consideration in the determination of a question of legitimacy of children. Otherwise, persons whose fathers and mothers were dead might hold, in many cases, their title to legitimate heirs, subject to the contingencies of venal and corrupt witnesses, who might be induced to testify to declarations of their fathers and mothers that they were never married.

There are several intermediate cases touching this rule, some of which may aid in defining the limits and in deter-

mining the extent to which credit is to be given to the testimony that may be admitted under it. There is one of that character in England, decided in 1836.

The King v. The Inhabitants of Sourton, 5 Adolph. & Ellis, 180

The rules of that case are thus expressed in the syllabus :
“ Neither husband nor wife can be examined for the purpose of proving non-access during marriage.

“ Nor can either be examined as to any collateral fact, for the purpose of proving non-access. As, that the husband, at a particular time, lived at a distance from his wife, and cohabited with another woman.”

This was a proceeding to determine the settlement of a pauper under the poor laws of England.

The moving party in the case, the respondents in the court above, proved the birth of the pauper, twenty-five years before the trial in Sourton ; and there rested their case.

To repel that evidence, the appellants proved by John Tickle, that he had been married to the pauper's mother in Sourton, seven or eight years before the pauper was born. This evidence was strengthened by an examined copy of the marriage register. It was then proved that the said John Tickle had, after that time gained a settlement at Clifton by renting a tenement there, which he had occupied about twenty-five years.

To meet that evidence the respondents relied on proving non-access of Tickle and his wife, and the consequent illegitimacy of the pauper. And to prove that point, they relied upon the evidence of Tickle himself. The chief question was, whether Tickle's testimony was admissible to establish that point. Lord Denman, C. J., said : “ It is desirable to show, in a case of such importance as this, that we adhere to the old rule of law, without any doubt. The rule cited in 2 Starkie on Evidence, page 139, note x, from *Goodright v. Moss*, 2 Cowper, 591, is, that parties shall not be permitted after marriage to say that they had no connection. Then — it being clear and indisputable law, that, for the purpose of proving non-access, neither husband nor wife can be a wit-

ness—the question is, whether the circumstances of the present case bring it within that rule. I wish the statement sent up to us had been clearer; but it is impossible not to see that the husband, being called for a different purpose, was cross-examined directly for the purpose of proving non-access. It is not necessary to say, that if he had been asked the questions that were put to him with a different object, the answers would not have been evidence; but, when he was asked where he lived at a particular time, with the avowed purpose of proving the fact of non-access, the rule prohibiting such inquiry became applicable. The sessions have expressly said, that they are satisfied with the proof of non-access if they were right in admitting Tickle's evidence, without which it was not sufficiently proved. They have, therefore, admitted the husband to prove what, by a rule of law, clear and undoubted, and of obvious public utility, they could not receive as evidence from him."

A like rule was held in the case of *The King v. The Inhabitants of Kea*, 11 East, 132. In this case the mother was held incompetent to prove the non-access of the husband, for the purpose of bastardizing her child.

The presumption of law, that a child born within matrimony is legitimate, was applied in North Carolina to a case where the parties had been divorced, on account of adultery in the wife, six months before the birth of the child.

Rhyne v. Hoffman, 6 Jones' Eq. 335.

The court justified the application of that rule of legitimacy as follows: "During the time when the child was begotten the husband and wife lived separately, but in the same neighborhood, near enough for the husband to visit her, and it is proved that occasionally he did go to the house where she was staying. There was then an opportunity for sexual intercourse between the parties, and from that the law presumes that, in fact, there was sexual intercourse between them. This plaintiff must, therefore, be taken to be legitimate, unless it be proven by irresistible evidence that the

husband was impotent, or did not have any sexual intercourse with his wife."

In case where a child is born in lawful wedlock neither of the parents can be allowed to testify that the child is illegitimate.

Haddock v. Boston and Maine R. R., 3 Allen (Mass.) 300.

But the court, in that case, held that the declaration of a deceased mother, that her child was born before marriage, was competent evidence of illegitimacy.

In *Phillips v. Allen*, 2 Allen (Mass.) 453, the legitimacy of a child born in wedlock was held to be presumed; and that that presumption could be overcome only by evidence which proved beyond all reasonable doubt that the husband could not have been the father.

The rule there prescribed must require it to be impossible that the husband could have been the father in order to authorize a jury to find that he was not. It is not left for them to speculate on probabilities, as in some other cases.

In that case a child was born in eight months after marriage, but had all the physical vigor and development of a full-grown child. There was also evidence against the chastity of the mother at the time of the marriage, and of her intimacy with other men for some months previous thereto. These facts and circumstances were held insufficient to rebut the presumption of legitimacy of the child, from the fact that it was born in lawful wedlock.

See *Patterson v. Gaines*, 6 How. U. S. 589; *Stegall v. Stegall*, 2 Brock, 256; *The King v. Luffe*, 8 East, 193.

There is a case in Rhode Island where the public registry of the father's marriage was held to be not conclusive evidence of the illegitimacy of a daughter, although the time of her birth ante-dated the time of registry. The fact that she was treated by him and his family as his daughter was held to be admissible and presumptive evidence of her legitimacy, notwithstanding the conflict between her birth and the marriage registry.

Violl v. Smith, 6 R. I. 417.

But in the same case, the declaration of the father concerning the daughter, that, unless he made a will, she would "get nothing by law," was held admissible to prove her illegitimacy; it being for the jury to pass upon the meaning and effect of such expression. The objection to the evidence was, that it did not point with certainty to illegitimacy, but would be just as true if she had been fully advanced. It was left to the jury to determine the meaning, as well as the effect of the evidence.

The same rule of presumption, in favor of the legitimacy of children born in wedlock, was pronounced in another recent case in Massachusetts.

Hemmenway v. Towner, 1 Allen, 209.

It was decided in that case that that presumption, in favor of legitimacy, could not be repelled by evidence of the wife's adultery while cohabiting with her husband, nor by his declarations after his decease that the child was not his.

So, also, in Virginia, where a child was born only three months after the marriage, and where the parties immediately separated in consequence thereof, the declarations of the husband that the child was not his were held insufficient to repel the presumption of legitimacy.

Bowles v. Bingham, 2 Munf. 442.

See, also, *Kleinert v. Ehlers*, 38 Penn. St. R. 439; and *Johnson v. Johnson*, 30 Mo. 72; *Kenyon v. Ashbridge*, 35 Penn. St. R. 157; *Green v. Green*, 14 La. An. 697; *The State v. Herman*, 19 Ired. 502; *Cannon v. Cannon*, 7 Humph. 410.

There is a case in Pennsylvania, holding that, where a child is born during wedlock, the presumption is, that it was the child of the husband, although the mother was visibly pregnant at the time of the marriage.

Page v. Dennison, 1 Grant's Cases, 377.

It was decided, in that case, that the presumption of legitimacy was the same, whether the child was begotten before or after wedlock; and that it could be bastardized only by proof of the non-access of the husband.

It was also decided in that case, that non-access could not be proved either by the father or the mother, or by the declarations of either; and that the rule of evidence in that respect was the same without regard to the form of the action or the proceedings.

There are other decisions to the same effect.

See *Dennison v. Page*, 29 Penn. St. R. 420; *Wright v. Hicks*, 15 Geo. 160; S. C., 12 id. 155.

In the last case cited, it was held that when a child was begotten before marriage, the presumption of legitimacy was not as strong, and could be rebutted by slighter evidence than where the conception was post-nuptial. This, however, does not seem to be the general rule.

There is a case in New York arising in proceedings for an order of filiation in a case of alleged bastardy, where the order was set aside, on the ground, that the mother being a married woman was not a competent witness to prove the non-access of her husband.

The People v. Overseers of Ontario, 15 Barb. 286.

The grounds of the decision are thus stated in the opinion: "The mother of the alleged bastard was a married woman, whose husband was living at the time of the alleged illicit intercourse and the birth of the child. And while she is, from the necessity of the case, a competent witness to prove the illicit intercourse, and who is in fact the father of the child, she is not competent as a witness to establish the non-access of the husband; nor his absence from the state; nor any fact which may be proved by other testimony. This seems to be the well settled rule."

The court set aside the order of filiation in the court of sessions, on the ground that there was no evidence to prove the non-access of the husband, or his absence, except the testimony of the wife and mother, which was held incompetent for that purpose.

See also *The Judge, etc., v. Kerr*, 17 Ala. 328; *Parker v. Way* 15 N. H. 45.

But rigid and inexorable as the rule now is in its presumption of legitimacy of children born in wedlock, it is much less so than it formerly was in England. The rule once was that a child born in wedlock could be proved a bastard only by proving that, "during all the time of the wife's going with child," the husband was beyond the "four seas."

Regina v. Murray, 1 Salk. 122.

The question as stated in that case was, "If the husband be *ultra mare*, and during the time the wife be got with child, whether this child be a bastard." The answer of the court was: "If the husband was out of the four seas during all the time of the wife's going with child, the child is a bastard; but if he were here at all within the time, it is legitimate and no bastard."

The meaning of the phrase "within the four seas," was "within the jurisdiction of the King." Co. Litt. 244 a.

That decision was made about the year 1700.

That doctrine was a few years after overruled in *Pendrel v. Pendrel*, 2 Stran. 295; and has never since been recognized.

Goodright v. Moss, Cowper, 294; *Sidney v. Sidney*, 3 P. Williams, 275.

In the case of *Goodright v. Saul*, 4 Term R. 356, the syllabus of the case is: "The child of a married woman may be proved a bastard by other evidence than that of the husband's non-access." That does not express the point of the decision with accuracy. A new trial was granted in that case, on the ground, as expressed in the opinion, that the judge on the trial, in his instructions to the jury, "had laid too much stress on the necessity of proving non-access, when the husband was within the realm, by witnesses who could prove him constantly resident at a distance from his wife."

The judge is reported to have told the jury that, though it was not absolutely necessary to prove the husband out of the realm in order to bastardize the issue; yet it was incumbent on the party insisting upon that fact to prove that the hus-

band could not, by any probability, have had access to his wife at the time."

The rule, as thus laid down for the guidance of the jury, was not too rigid according to other cases which we have before cited. The rule in this country has been held more rigid in favor of legitimacy than was therein expressed to the jury.

There was, in that case, a feature which may be supposed to have had more effect in determining the decision of the court ordering a new trial, than any error in the direction of the judge to the jury.

The action was ejectment. The defendants, who were tenants on the estate, set up the title of John Turner Hales, as being the great-grandson of Elizabeth Tilyard. The question turned upon the evidence touching his legitimate descent from Elizabeth. The defendants failed to prove any marriage in fact between her and Joseph Hales, the great-grandfather of J. T. Hales. But they relied upon other evidence of pedigree to show the legitimacy of J. T. Hales in that line of descent.

To counteract this evidence the other side proved a marriage in fact of the said Elizabeth with one Simon Kilburn, with whom she lived for some time without issue; that Kilburn left and Elizabeth then lived with Hales as his wife for several years, "during which time that son was born, who was stated in the pedigree to be the issue of Elizabeth and Joseph Hales; and who, it was proved, had always been considered in the family as a bastard." The testimony tended to show that the husband, Kilburn, was still living in London.

The defendant's counsel then changed the ground of their defense, and claimed that J. T. Hales was the son of Kilburn, on the ground that, as Kilburn was in the country, Joseph Hales must be regarded in the eyes of the law as his son, on the ground that the plaintiff had failed to prove non-access of the husband; and upon that theory the defendants had a verdict. The case was, therefore, made to turn upon

a trick of the law, if not a trick of the lawyers. A reluctance to sanction so absurd a theory, may be supposed to have had more effect in inducing the court to grant a new trial than any error in the rule propounded to the jury.

The rule as to the character of the evidence required to bastardize children born in wedlock, was stated in *The King v. Luffe*, 8 East, 193, before cited, as follows, by Lord Ellenborough, C. J.: "From all these authorities, I think this conclusion may be drawn, that circumstances which show a natural impossibility that the husband could be the father of the child of which the wife is delivered, whether arising from his being under the age of puberty, or from his laboring under disability occasioned by natural infirmity, or from the length of time elapsed since his death, are grounds on which the illegitimacy of the child may be founded."

The rule is stated by Lawrence, J., in the same case, more particularly. He said: "The doctrine of the *quatuor maria* has been long exploded; and it has been shown by the authorities that imbecility from age, and natural infirmity from other causes, have always been deemed sufficient to bastardize the issue; then why not give effect to any other matter which proves the same natural impossibility? It is said, however, that in so doing we shall shake a settled rule of law, that if a child be born in wedlock, though but a week after the marriage of its parents, such child is to be deemed legitimate. But I do not see that the consequence supposed would follow. By the civil law, if the parents married any time before the birth of the child, it was legitimate; and our law so far adopts the same rule, that if a man marry a woman who is with child, it raises a presumption that it is his own. Lord Rolle gives some such reason for the rule; and it seems to be founded in good sense; for where a man marries a woman whom he knows to be in this situation, he may be considered as acknowledging, by a most solemn act, that the child is his."

This argument effectually disposes of the point founded upon the fact that the child was born during wedlock, and,

therefore, must be assumed as proved to be legitimate. That class of cases is based upon the presumption of an implied concession, that the child begotten before marriage was the child of the parties married. The marriage itself, under such circumstances, is very strong evidence that the husband was the father of the child ; not so much from the fact of the marriage as that the consent to the marriage was an admission that he was the father of the unborn child.

It is the rule of this country, that a child born soon after marriage is presumed to be legitimate, upon the theory stated in the case last cited. The contract of marriage is not held to be an estoppel to the denial of paternity of the unborn child, but only as evidence of admission of paternity on the part of the husband. No doubt that evidence might be controverted. Otherwise, it must be the rule that all children born in wedlock are not only presumptively legitimate, but conclusively so ; and, therefore, not subject to actual proof to the contrary. Marriage after the child is begotten, is no more conclusive evidence of its paternity than is the fact of marriage before the child is begotten. The extent of the rule in either case seems to be only this, that a child born during wedlock is presumptively legitimate ; but the legitimacy is open to proof to the contrary. There seems to be no distinction, in this respect, between marriage celebrated after the child is begotten and children not only born but begotten in wedlock. In regard to this point there has been much discussion, but the rule may be safely assumed to be settled as stated in the case last cited.

The rule upon this point is declared in *Morris v. Davies*, 3 Carr. & P. 216, as follows :

“ Every child born in wedlock, the husband and wife being in England, and not separated by any sentence of divorce, is presumed to be legitimate ; but this presumption may be repelled by proof of such facts as satisfy the jury that no sexual intercourse took place between the husband and wife at a time when the husband could by possibility be the father of the child ; and the jury, before they can find against the

legitimacy, must be convinced that no such sexual intercourse took place, by irresistible evidence, and not by a mere balance of probabilities. If such intercourse did take place, the adultery of the wife is immaterial; and if there was an *opportunity* of sexual intercourse between the husband and wife, the law presumes that such intercourse did take place, unless the contrary is satisfactorily proved."

In that case the evidence called for the application of the rule there laid down in all its parts and principles; and the jury disposed of the case upon questions of fact presented by the testimony.

Third. The effect, or the consequences of marriage, are not the same in regard to the rights of the parties in the laws of all countries, or by the laws of all the States. It is true that marriage creates the personal status of husband and wife, which gives to the parties thereto the rights of husband and wife wherever they may be. But the extent and character of those rights differ in different countries. The question has arisen whether the rights of husband and wife, as established in the State or country where they entered into marriage, go along with them to every other country where they happen to be, or to reside, or whether those rights are to be ascertained and determined by the laws of the State or country of their domicile. There seems to be no doubt that the laws of the place of domicile must control in that respect. But the personal or relative rights of husband and wife are not within the scope of this work, beyond the effect caused by marriage upon the legitimacy of their offspring. The effect of marriage upon legitimacy of children differs in some States and countries in some respects; and hence questions occur, whether the law of the place where the marriage was entered into, or the law of the place where the estate of inheritance lies, shall control questions of legitimacy of children where there is a difference in those laws.

The question may thus arise, as it has sometimes arisen, whether children born before marriage, but made legitimate by marriage thereafter, in a State or country where the rule

of the civil or ecclesiastical law prevails, will be regarded as legitimate for the purpose of inheriting land, in a State or country where the common law rule prevails, which legitimates only such children as were born after marriage.

No doubt the marriage would be accepted as legitimate, so far as to insure to the husband and wife the status of matrimonial relations. But the legitimacy of the children born before the marriage, effected by the laws of the one State or country, will not be accepted by the laws of another State or country, where the law legitimates only such children as were born before marriage, so far at least, as to render them legitimate heirs within the line of succession to estates of inheritance. In other words, treating the marriage of a foreign State as legitimate does not necessarily accept as legitimate all the consequences of marriage in that foreign State. Estates of inheritance depend upon contracts of grant; and the *lex loci contractus* applies to them, as well as to contracts of marriage. Each State has its own laws determining who shall be heirs within the meaning of that term as called for in its grants of estates of inheritance in land; and the law of the country where the land lies must prevail in that respect over the law of the foreign State where the marriage contract was made.

The question of the effect of a marriage after the birth of a child was very elaborately considered in England, in the house of Lords, in *Doe v. Vardill*, 6 Bingham, N. C. 385.

The facts were as follows: A. went from England to Scotland, and continued to reside there until his death, many years after he became resident of Scotland. A., while in Scotland, cohabited with M., an unmarried woman, and had a son, B., by her, who was their only son. Several years after the birth of B., A. and M. were married in Scotland, according to the laws of that country. By the laws of Scotland, this after-marriage legitimated the birth of B. as completely as though he had been born after the marriage, for the purpose of inheriting land, and for every other purpose, in Scotland. A. died seised of land in England, in-

testate. The question was whether B. took the estate in England as the heir of A.

All the judges, in an opinion by Tindal, Ch. J., concurred in holding that B. did not succeed to the estate of which A. died seised in England.

They stated it as their opinion, that it was "a rule or maxim of the law of England, with respect to the descent of land in England from father to son, that the son must be born after actual marriage between his father and mother; that this is a rule *juris positivi*, as are all the laws which regulate succession to real property; this particular rule having been framed for the direct purpose of excluding, in the descent of land in England, the application of the rule of the civil and canon law, by which the subsequent marriage between the father and mother was held to make the son born before marriage legitimate; and that this rule of descent being a rule of positive law annexed to the land itself, cannot be broken in upon or disturbed by the law of the country where the claimant was born, — and which may be allowed to govern his *personal* status as to legitimacy, — upon the supposed ground of the comity of nations."

Two general questions were made the subject of discussion: 1. Whether it was the law of England that marriage after the birth of a child did not legitimate the child, so that he could succeed as heir to the estate; and 2. Whether the fact that the subsequent marriage made the son legitimate in Scotland governed his right of inheritance in England.

The case is reported as decided in the Court of King's Bench, 5 Barn. & Cress. 438.

In that court only the second question seems to have been discussed, namely: whether "the right of inheritance follows the law of the domicile of the parties," or "that of the country where the land lies."

The judges were unanimous in holding, that the law of the country where the land lies must control. Much reliance was placed upon the statute of Merton, as declaratory

of the law upon this point. That statute was peculiar in form, when compared with modern legislation. It was set forth in the report of that case as follows: "To the King's writ of bastardy, whether any one being born before matrimony may inherit in like manner as he that is born after matrimony, all the bishops answered that they would not, nor could not, make answer to that writ; because it was directly against the common order of the church. And all the bishops instanted the lords, that they would consent that all such as were born afore matrimony should be legitimate, as well as they that be born within matrimony, as to the succession to inheritance, forasmuch as the church accepteth such as legitimate. And all the earls and barons, with one voice, answered, that they would not change the laws of the realm, which hitherto have been used and approved."

One argument urged in favor of the plaintiff was, that the marriage, being valid by the laws of Scotland, was valid in England, and that legitimacy was a personal status.

The answer to that, by Bayley, J., was: "I concede that the *lex loci* governs the question of marriage; but whether all the consequences recognized in a foreign country, as following upon a marriage there, are also to be recognized in this country, is a very different question, and I think must be answered in the negative. In my judgment, the right to inherit land depends upon the quality of the land, and not upon any personal status. In this country there are many different tenures, and the question in each is, who is *hæres*, according to the law of England?"

The true ground upon which that question was made to turn, was stated by counsel for the defendant, as follows: "The result appears to be this: that feudal inheritance is a matter of contract, and every contract must be construed according to the laws of the place where it is to have effect." "Now, *hæres*, according to Lord Coke's definition, is '*ex justis nuptiis procreatus*.' No person who does not answer that description can be within the meaning of the contract,

which must be construed as between the King and the subject, and, therefore, in favor of the former (all feudal grants having been originally made by him),^c who has a direct interest by reason of his right in the case of escheats."

5 B. & C. 449, 450.

That mode of stating the case relieves the question of all its perplexities. It is not a question of personal status, but a mere question of contract. The question is not whether the claimant may have been an heir of the ancestor in the country of his domicile, but whether he is an heir in the country where the land lies, within the meaning of the contract under which the land was held by the decedent. The contract must control, and no one can succeed on the death of another, unless he fulfills all the requirements called for by the contract. The *lex loci contractus* is the law of the case.

This is one of the numerous questions which have indirectly resulted from the operation of the statute *quia emptores*. The lands being held by a grant immediately from the crown, and by a tenure which could not exist between one individual and another, the fact that the individual right depended upon a contract was overlooked, just as it is in this country. The tendency was then, and is now, to lose sight of the point, that every estate of inheritance in land rests upon a contract, and that the law of contracts must govern. So, in this case, the *lex loci contractus* determined who was the heir called for by the contract of grant upon the death intestate of the tenant in possession.

The question might be put under circumstances that would admit of no discussion, and still would present the same point, in principle. Suppose a man dies intestate, the owner of an estate of inheritance in land. He leaves children, recognized by the laws of the State where the land lies, as heirs, because they were born in lawful marriage. He also leaves children, born in another State, out of wedlock, but who were legitimated by the laws of the State of their domicile. It would not be contended that the latter could inherit

in the State where the land was located ; because, there they would not be *heirs*, within the meaning of the word *heirs* called for in the contract which created the estate of inheritance.

The question of alienage serves to illustrate this point. A person born in another country may be an heir of an intestate. But if he is an alien heir, he may not be an heir within the meaning of the word "heir," as used in grants of estates of inheritance where the land lies, and where the laws exclude aliens from inheritance. A person who succeeds to an estate of inheritance as an heir, succeeds only because he answers to that character, as the word "heir" is used in the grant of the premises from the State. If he falls short in any of the qualifications which are required by law to constitute an heir, he is not by law one of the parties to the contract under which the land is held, and, consequently, cannot succeed thereto as an heir.

There seems to be no reported case in this country where a question of that character has arisen. There are cases where ante-nuptial contracts made in other countries have been enforced in this country, so as to effect the distribution of the personal property of a decedent, differently from the distribution which the law would otherwise have made.

Decouche v. Lavetier, 8 Johns. Ch. R. 190 ; Story on Conflict of Laws, § 168.

But there is a distinction between obligations which rest upon a contract and the rights and duties growing out of, and incident to, matrimonial relations ; because marriage, although it is a contract to begin with, is more than a contract in its effects and consequences.

The distinction between a mere contract and marriage is very clearly stated in Story on Conflict of Laws, § 111, in language quoted from a distinguished judge, of Scotland, as follows : " It is said, that, in every contract the parties bind themselves, not only to what is expressly stipulated, but also to what is implied in the nature of the contract ; and that these stipulations, whether express or implied, are not affected

by any subsequent change of domicile. This may be true in the general case, but, as already noticed, marriage is a contract *sui generis*, and the rights, duties and obligations which arise out of it, are matters of so much importance to the well-being of the State, that they are regulated, not by private contract, but by the public laws of the State, which are imperative on all who are domiciled within its territory. If a man in this country were to confine his wife in an iron cage, or to beat her with a rod of the thickness of the judge's finger, would it be a justification in any court to allege that these were powers which the law of England conferred on a husband, and that he was entitled to the exercise of them, because his marriage had been celebrated in that country? "In short, although a marriage, which is contracted according to the *lex loci*, will be valid all the world over, and although many of the obligations incident to it are left to be regulated solely by the agreement of the parties, yet many of the rights, duties and obligations arising from it, are so important to the best interests of morality and good government that the parties have no control over them, but they are regulated and enforced by the public law, which is imperative on all who are domiciled within its jurisdiction, and which cannot be controlled or affected by the circumstance that the marriage was celebrated in a country where the law is different. In expounding or enforcing a contract entered into in a foreign country, and executed according to the laws of that country, regard will be paid to the *lex loci*, as the contract is evidence, that the parties had in view the law of the country, and meant to be bound by it. But a party who is domiciled here cannot be permitted to import into this country a law peculiar to his own case, and which is in opposition to those great and important public laws which our legislature has held to be essentially connected with the best interests of society."

The distinction, there so clearly indicated, obviously embraces the legitimacy of heirs touching their rights of succession to estates of inheritance in land. It is true the

legitimacy of children is one of the incidents or consequences of marriage laws, and of the marriage contract. But they are incidents and consequences of a character so important to the order and best interests of society, that each State exercises the exclusive right to regulate them by its own laws and customs, instead of permitting its landholders to import different laws and customs from a foreign State or country, by simply going there to enter into marriage. For example, suppose a man enters into marriage in a State or country where primogeniture is the law of succession, and then becomes a landholder in a State or country, where all the issue inherit alike, without distinction of age or sex. It will not be contended that such landholder has brought with him the law of the place of his marriage, and that, consequently, his eldest son must succeed to his estate, to the exclusion of all the other children, when he shall die intestate.

This is putting an extreme case, in one aspect, but it does not differ in principle from any other case where the laws of legitimacy and succession of the State where the marriage was entered into are different from the laws of legitimacy and succession in the State where the land lies.

The laws of the States upon the subject under examination differ in some respects. Some follow the civil law, and legitimate children born before marriage as well as those born after. While others follow the common law custom, and legitimate only those born after marriage. There are others which leave it to the personal arrangement of the father, whether ante-nuptial children shall be legitimate.

There will, therefore, probably be occasions when there may be a conflict of the laws upon this subject, between the place of marriage, or even of domicile and the place where the land lies.

In those States which have so far departed from the common law rule as to permit non-resident foreigners to hold lands within their limits, the question very naturally may arise, whether the laws of legitimacy and succession of the

place of domicile of the owner, or the laws of the place where the land lies shall govern. It would seem as though there might be an irreconcilable conflict between the laws of the two countries in such cases. The laws of the State where the land lies could not be applied to the owner of the land in his foreign domicile; nor could the laws of the domicile be applied in the foreign country where the land lies.

As yet, there appears to have been but little discussion or litigation in this country in regard to questions of this character. There has been something of the kind in New York, in the case of the *Duke of Cumberland v. Graves*, 7 N. Y. 305, and in other like cases, arising on the same territory. It seems that New York, near the close of the last century, and for a few years in the beginning of the current century, gave to non-resident aliens the same rights to hold lands in the State as were enjoyed by the citizens of this country. During the period of this extreme liberality toward foreign residents, a large tract of territory in the State passed by conveyance to one of the rich and titled families of the British government, resident in Scotland. The immediate question before the court was, whether lands in New York could pass by descent from alien ancestors to alien heirs. The question, by the laws of which country the succession should be governed, does not seem to have been raised in the case. But the decision appears to have assumed that the laws of Scotland governed the transfer of the title and the line of succession, and that the courts of New York were to be governed by the laws of the domicile of the foreign owners upon that point.

It is not easy to perceive how, in practice, it could be otherwise. If primogeniture prevailed there in determining the line of succession, primogeniture must prevail here. If the descent was confined to males there, to the exclusion of females, it must be so limited here. The State has simply surrendered jurisdiction of its own territory to citizens and residents of a foreign country, and they must, necessarily, submit to the jurisdiction and government of the laws and

customs of that country to that extent. That is the tone and sentiment of the decision in the case here cited, and in others of like character. It is a humiliating position for an independent State to place herself in, and has proved to be far otherwise than favorable to the peace and prosperity of the territory which has thus passed under a foreign dominion. And the decisions go further, and hold that the State has no constitutional power to legislate in regard to the lands thus held by non-resident aliens, until they choose to relinquish their title and their authority by conveying to resident citizens of the State.

The results of that example of extreme freedom in the commerce of land, demonstrate that the price of such extreme liberality to the resident citizens of foreign governments, is an irrevocable surrender of the sovereignty of the State that makes it, and the freedom of its own citizens, to the extent of whatever territory may thus pass into foreign hands. If, perchance, the whole territory of a State should thus pass to foreign owners, there would be but little left for the State where the land was situated to legislate about.

Fourth. We have before shown that bastards could, at common law, succeed to an estate of inheritance in no case; and that they could be the source of inheritance or the stock of descent, only to their own issue, born in lawful wedlock.

The rigid and inexorable rule of the common law has been somewhat relaxed in most, if not all, of the States.

In several of them, an illegitimate child is capacitated to take an estate of inheritance as the heir of his mother and of his maternal ancestors; and the lawful issue of such illegitimate child takes by descent any estate which the illegitimate parent might have taken, if he had lived.

The States which have so changed the rule of the common law are Massachusetts, Mississippi, Vermont, Alabama and Texas.

Some of the States have adopted the rule of the civil law and legitimated all children born before the marriage, equally with the postnuptial children. In some, acknowl-

edgment by the husband that he is the father of the child, constitutes the child legitimate and places him in the order of descent on an equal footing with children born in wedlock.

The States which have adopted that policy by statute are, Massachusetts, Vermont, Maryland, Virginia, Kentucky, Mississippi, Texas, Oregon, Indiana, Arkansas, Ohio, Missouri and Illinois.

In some of the States, illegitimate children seem to be placed in the regular order of descent, to both take and transmit estates from the mother, in very nearly, or quite the same manner as though they were legitimate. Such appears to be the rule in Arkansas, Florida, Iowa, Kentucky, Missouri, Pennsylvania, Rhode Island, Virginia, Ohio, New Hampshire and Illinois.

In some of the States, the estate of an illegitimate intestate descends to the mother, when there are no lawful issue of the intestate living. And the lawful issue of the illegitimate child may take by representation any estate which the mother would have taken. Such seems to be the rule in Massachusetts, Indiana, Mississippi, Texas, Alabama and Vermont.

In Tennessee, the estate of an illegitimate intestate who leaves no issue, and no husband or wife, descends to the mother. And in case there is no mother living, then to his brothers and sisters by his mother and their descendants.

The rule in Georgia is about the same.

In North Carolina and Oregon, illegitimate children inherit from the mother directly, but cannot take, by representation, any estate of her relatives.

There are provisions in some States whereby the illegitimate child becomes not only the heir of his mother, but of any one who acknowledges in writing, in a particular manner prescribed, that he is the father. But children so acknowledged are not regarded as legitimated to the full extent of legitimately born children. They can take by descent immediately from the father or mother as the stock of descent; but cannot take by representation from either

the lineal or collateral relatives, of either father or mother, except when the parents shall intermarry. Estates of the illegitimate intestate, without lawful issue, descend to the mother and her heirs at law, unless the intestate leaves a husband or wife, in which case such husband or wife shares equally with the mother of the intestate and her heirs. Such appears to be substantially the rule in Maine, Michigan, Minnesota, California and Wisconsin.

In New York, it is provided in the chapter of the Revised Statutes, entitled "Of Title to Real Property by Descent," that "children and relatives who are illegitimate, shall not be entitled to inherit, under any of the provisions of this chapter."

1 R. S. 754, § 19.

But in 1855, an act was passed, as follows: "Illegitimate children in default of lawful issue, may inherit real and personal property from their mothers, as if legitimate; but nothing in this act shall affect any right or title in or to any real or personal property already vested in the lawful heirs of any person heretofore deceased."

Chap. 547, Laws of 1855.

This statute was held not applicable in favor of an illegitimate child of the intestate, who died before the enactment of the statute, but whose property had not then been distributed. The decision was put upon the broad ground that the heirs and next of kin of the intestate had rights, vested immediately on the death of the intestate, of which they could not be deprived without due process of law; and that an act of the legislature was not such process. The surrogate stated the ground of his decision, as follows: "that, immediately on the decease of an intestate, his next of kin became instantaneously clothed with a vested right to share in the surplus of his personal estate, after the payment of his debts, in due course of administration, notwithstanding the fact that this right cannot be enforced except through the medium of an administrator. This claim to a distributive

share cannot by an act of the legislature be confiscated, or be taken away and granted to another person, and although the law may be changed as to future cases, such a change cannot affect a right of succession already devolved."

Ferrie v. The Public Administrator, 3 Bradf. R. 268.

This doctrine will apply with equal, if not greater force, to the right of heirs to the real estate which comes to them by descent; because, in that case, the administrator is in no manner interposed between them and their immediate right of enjoyment.

It has been decided, in Pennsylvania, that an estate descended to a legal heir cannot be divested by a subsequent act legitimating a bastard.

• *Killan v. Killan*, 89 Penn. St. R. 120.

It seems to have been the tendency of the courts to construe statutes, contrived to favor illegitimate children with rights of inheritance, strictly against them. There is an example of that kind in *Kent v. Barker*, 2 Gray, 535. The word "children" used in a statute providing for children who had been unintentionally omitted by a testator in his will, or who were presumed to have been so omitted, that they should take their share by inheritance, was construed to embrace only legitimate children, on the ground that the word "children" meant, at common law, only legitimate children.

The same rule of construction was sanctioned in the case of *McCool v. Smith*, 1 Black, U. S. R. 459. The rule was thus stated: "Terms of kindred include only those who are legitimate, unless a different intention is clearly manifest."

A provision in the statute of Massachusetts, that "every illegitimate child shall be considered as an heir of his mother, and shall inherit her estate in whole or in part, as the case may be, in like manner as if he had been born in lawful wedlock," was held not to apply to grandchildren, children of such illegitimate child.

Curtis v. Hewins, 11 Met. 294.

The action was trespass *quare clausum fregit*. The defendant set up title in himself. The evidence showed that the title to the land had been in the mother of an illegitimate son. He died before his mother, leaving legitimate children. She died seised of the land in question, intestate. The legitimate children of the illegitimate son claimed title by descent, and conveyed the premises to the defendant. The plaintiff had a verdict, under directions of the court on the trial, and the court above sustained it.

See, also, *Hughes v. Decker*, 38 Maine, 153.

There is a statute in Vermont similar in its provisions to the New York statute, that "bastards shall be capable of inheriting and transmitting inheritance on the part of the mother." The question arose whether the illegitimate children could inherit from legitimate children of the same mother. It was held they could not; that the statute should be construed strictly, so that the right of inheritance should extend no further than between the mother and the illegitimate child.

But under a similar statute illegitimate children are held to take equally with legitimate.

Alexander v. Alexander, 3 Alabama, 241.

In Tennessee, statutes legitimating bastards, have been held entitled to a fair, if not a liberal construction; and that the words "heir, inherit, joint-heir, will be construed to give to legitimated children all the rights of inheritance and succession that would attach to them had they been born in lawful wedlock."

Swanson v. Swanson, 2 Swan, 446.

It is the undisputed rule that the statutes of every State shall be construed according to the manifest intention of the legislature, when such construction does not conflict with the restraints imposed upon the legislature, either by the Constitution of the State or the Constitution of the United States. Statutes touching the legitimization of bastards, or the extension to them of inheritable rights, are not exceptions to that rule. There is no apparent reason why there should be any departure therefrom, either by way of strictness or liberality.

SECTION II.

ALIENAGE — ITS EFFECTS UPON THE RIGHT TO INHERIT.

The disabilities of holding estates of inheritance, which attach to aliens where the common law rule prevails, have been considered in the work before referred to.

Bingham on Real Estate, 89, *et seq.*

In regard to the general subject of alienism, and the rules and principles which control, we propose to add nothing to what we have before submitted, except so far as it pertains to the rights of succession by an heir to his ancestor, to estates of inheritance in land.

According to the common law, as originally adopted in this country, it was not enough that a person was in the order of succession prescribed by statute as required to take lands by descent, upon the death of the owner thereof intestate. He must also have been a citizen of the United States at the time of the death of the intestate. He could not qualify himself to inherit by becoming a citizen afterward.

He did not fulfill the qualifications called for by the grant of an estate in fee, required to constitute him an heir within the meaning of the word *heir*, as used in the grant, unless he was a citizen of the United States at the time of the death of his ancestor.

The student will understand the matter more readily and more clearly by examining a practical case.

Jackson ex dem. Fitz Simmons v. Fitz Simmons, 10 Wend. 11, is a good case to illustrate the rule involved and its practical application.

The action was ejectment for about two hundred acres of land, brought by Patrick Fitz Simmons against Thomas Fitz Simmons. It appeared that one Felix Fitz Simmons had died seised of the premises in question in 1828, intestate. He was a naturalized citizen and left no issue. While alive he had five brothers and two sisters, all aliens.

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The defendant was one of his brothers, and was naturalized in 1810. This made his right of succession to his deceased brother certain and unquestioned. It was not in dispute in the case. The only question was whether the plaintiff was not also an heir and entitled to share with the defendant in the inheritance. He, too, was a naturalized citizen at the time of the death of the intestate, and consequently was entitled to hold real estate. There was no question on that point. But the plaintiff was not a brother of the intestate, but was the son of another brother, who died in 1820. He and all his children were at the time of his death aliens. The plaintiff was, after the death of his father, naturalized. It will be seen that the plaintiff and the defendant were not, in their relation to the intestate in the same degree of consanguinity.

The plaintiff was further removed from the intestate than the defendant, and could not take at all according to the rule of proximity. He did not claim by that rule, but based his demand of title upon the rule of representation. In other words, he claimed to be entitled to the right which his father might have claimed, had he been alive and a citizen. Therein arose the only question of the case. The father of the plaintiff had no title at all, for he was not a citizen. The son could claim only as his representative. Hence the question was, whether the son had any title. The court decided he had none. The point was plain, and the conclusion inevitable. The son could take only as the representative of his father. The father was an alien, and therefore had no title. His representative could be in no better condition.

This decision was had in New York under the statute of descents as it existed before the Revised Statutes took effect. As stated by the court: "The provision referred to is the fifth canon of descent, as prescribed by the act of the 23d of February, 1786 (1 R. L. of 1813, p. 53), and is as follows:

"*Fifthly.* In case any such brother or sister, *who would have inherited by this law, if living*, shall die before the said person so seised, and leave a lawful child or children, such

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child or children surviving the said person so seised shall inherit, if a child, solely, and if children, as tenants in common, in equal parts, such share as would have descended to his, her or their father, or mother, if such father or mother had survived the person so seised."

This statute made the question clear, that the son could take only what his father would have inherited, if living; and as his father, if living, would not have inherited any right, by reason of being an alien, so the son could inherit nothing.

The foregoing case serves to illustrate the character of the disqualification of alienism, and the principle upon which it is founded. The intestate left brothers and sisters other than the defendant. So, the other deceased brother, the father of the plaintiff, left other children than the plaintiff. If the degrees of consanguinity with the intestate had been the only criterion by which to determine who were his heirs at law, they would all have been equally entitled. But those who were not citizens of the United States were excluded, because they lacked the capacity to become parties of the second part to the contract of grant or lease from the State, which constituted the estate of inheritance. The State had so far retained the policy of the feudal law as to hold that no persons could become tenants in fee of lands who were not citizens of the United States. The statesmen of that era had the sagacity to perceive, that serious inconveniences might arise if citizens of other countries were allowed to hold lands in fee in this country; because while the subject of the holding, or the property, was and must ever remain within the jurisdiction of the State, the owners themselves were outside of the jurisdiction. We have before sufficiently suggested the troublesome conflicts of the laws which might arise. Hence, the policy of requiring every tenant of an estate in lands to be within the reach of, and subject to, the jurisdiction of the laws of the country where the land lies.

In the Revised Statutes of New York, provision was made for cases like the case last cited, so that the child, who was naturalized at the time of the death of an intestate, might

inherit, although his father had before died a foreigner. We have cited the provision which declares that no person capable of inheriting "shall be precluded from such inheritance by reason of the alienism of any ancestor of such person."

1 R. S. 754, § 23.

That provision has been construed to change the rule, in a case like the one last cited, so that the child who has become a citizen by naturalization shall not be precluded from taking an estate by inheritance as the representative of a deceased parent, who was not naturalized, on the ground that the parent was not naturalized. To accomplish that result was the aim and end of the provision in the Revised Statutes here cited.

It has been decided, however, that that provision did not enable a naturalized citizen to take by descent as the representative of a parent not naturalized and alive at the death of an intestate.

The People v. Irvin, 21 Wend. 128.

In this case the plaintiff claimed to recover possession of the premises in question, on the ground that they had escheated; in other words, that the grant in fee under which the premises had been held, had ceased to exist on the decease of the last tenant intestate, because that tenant left no heirs capable of succeeding him in the tenancy.

The last tenant seised, upon whose death the premises were claimed to have escheated, was a naturalized citizen, who left neither father nor mother, nor lineal descendant; and no relatives in the collateral line, except brothers and sisters, who were at the time of his death aliens, and a son of one of those brothers, who was a naturalized citizen. This son, the nephew of the intestate, claimed to be capable of inheriting under the statute last before cited. The case was decided against him, on the ground that the nephew of a person dying intestate, and seised of an estate of inheritance, although a *naturalized citizen*, is not capable of inheriting the estate, if his father be an *alien* and living at the time of

the decease of the person last seised, notwithstanding the provision in the statute of descents."

In this case, the premises were alleged to have escheated on the death of Thomas Irwin "without heirs capable of inheriting."

The deceased left a brother residing in Scotland, an alien. A son of this brother, the defendant in the case, was a naturalized citizen at the time of the death of the intestate. He claimed to be the heir at law of the intestate, capable of inheriting. The objection was, that he claimed only as the representative of his father, and his father was then alive and an alien. It was held that our statute, before cited, did not enable a person to deduce title through an "alien ancestor still living."

The point of the decision was thus stated by the court: "The brother of the person last seised, if a citizen and capable of inheriting at the time of the decease of the intestate, would have taken the estate under section 8 of our statute of descents; and if dead, leaving issue, also capable, they would like him have taken under the same section. But he is an alien and therefore cannot take, and his uninheritable blood impedes the descent to the naturalized son, the defendant. It is perfectly settled upon all the law, that the nephew does not inherit immediately or personally from the uncle; that he must derive title from the common stock (the grandfather) through the blood of the father. He stands in the second degree."

In regard to the statute in question, it is remarked, that it "was taken substantially from the 11 and 12 Wm. III, chapter 6, which is understood to apply only to the case of a deceased, not of a living, ancestor."

In support of that construction of the statute, the decision in *McCreery's Lessee v. Somerville*, 9 Wheaton, 354, is entirely confirmatory. In that case, the intestate left no children, but a brother, a native of Ireland, alive, but not naturalized, and three daughters of this brother, who were native born citizens of the United States.

The question in the case was thus stated by Story, J.: "The title of the lessor of the plaintiff to recover in this case depends upon the question, whether she can claim as one of the co-heirs of her deceased uncle, her father being an alien, and alive at the commencement of the present suit. It is perfectly clear that, at common law, her title is invalid, for no person can claim lands by descent through an alien, since he has no inheritable blood. But the statute 11 and 12 Wm. III, chapter 6, is admitted to be in force in Maryland; and that statute, beyond all controversy removes the disability of claiming title by descent, through an alien ancestor. The only point, therefore, is, whether the statute applies to the case of a living alien ancestor, so as to create a title by heirship where none would exist by the common law if the ancestor were a natural born subject."

That decision arose in Maryland and depended upon a statute substantially like the provision of the English act referred to.

There is another case in the same court, holding, that, "under the laws of New York, one citizen of the State cannot inherit in the collateral line to the other when he must make his pedigree, or title, through a deceased alien ancestor."

Lessee of Levy v. McCartee, 6 Peters, 102.

That decision referred to a time before the Revised Statutes.

See, also, *Jackson v. Green*, 7 Wend. 333.

It was held, in the case last cited, that, at common law, one brother could inherit of another, though the father was an alien. And it is said: "Collateral descent from brother to brother is immediate, taking no notice of the father; but from uncle to nephew, or nephew to uncle, the descent is mediate, the father being the medium through which the descent must pass. Hence, one brother may inherit from another, though the father be an alien, or attainted; but a grandson cannot inherit from his grandfather, the father

having died in the life of the grandfather, provided the father was an alien, or attainted ; but the land shall escheat."

See 3 Salk. 129 ; *Jackson v. Lunn*, 3 Johns. Cases, 109 ; *The People v. Conklin*, 2 Hill, 67 ; *Orser v. Hoag*, 8 id. 79.

In a recent case in New York, it was held, that, where the decedent left a surviving sister and a niece, her daughter, the former an alien and the latter a citizen, the latter did not take his real estate by inheritance. This decision was also put upon the ground that the statute enabling a person to take an estate by inheritance, deducing title by descent through an alien relative of the intestate, who died before the intestate, did not bestow the ability to do so through an alien relative living at the death of the intestate.

McLean v. Swanton, 18 N. Y. 535.

It has been decided in New York, that the rule which enables brothers, sons of an alien father, to inherit of each other, because the descent between them is immediate, applies also between one of the brothers and the representative of the other.

McGregor v. Comstock, 8 N. Y. 408.

The descent being immediate between the brothers, so that an alien father cannot be interposed as an obstacle, it would seem to follow as a matter of course, that the interposition of the alien father of the brothers could be no obstacle to inheritance between one of the brothers and the children of the other, or between the descendants of both.

The children of a deceased brother succeed as heirs to the surviving brother, by representation of their deceased father. Consequently, the alienism of the grandfather cannot be an obstacle to their succession. He cannot possibly be a medium of inheritance between them. The brothers are respectively the stock of descent. Alienism can be no impediment to inheritance, only when it comes between the stock of descent and the person who seeks to take. And then the statute before referred to as 11 and 12 Wm. III, chapter 6, removes that obstacle in case this alien medium is deceased, not if he is alive at the death of the intestate, as that statute has been

construed. That statute seems to have been generally adopted in the United States, in substance and effect.

But, as between brothers who had an alien father, that statute does not apply. "It has become a maxim of the law that as between brothers, a father, although a *medium sanguinis* is not a *medium hereditatis*."

Parish v. Ward, 28 Barb. 331.

In such case the application is not called for.

The English statute, 11 and 12 Wm. III, chapter 6, has been held to be the same in substance and principle with the New York statute (1 R. S. 754, § 22), which provides that no person capable of inheriting real estate shall be precluded from such inheritance by reason of the alienism of any ancestor of such person.

McLean v. Swanton, 13 N. Y. 539.

It was said by the court, per Denio, Ch. J., touching the English act and the New York: "Upon carefully comparing the two enactments, we are unable to see any distinction which can affect this question, or indeed any substantial difference whatever. The New York statute contains the whole principle of the English, stripped of the redundant phraseology in which acts of parliament were in that day clothed."

The question for the court to decide in that case, was the often before decided one, whether that statute enabled a person to take an estate of inheritance who deduces title by descent only through a living alien relative of the deceased, who would himself inherit the estate were he a citizen.

We have before cited this case as authority, that the daughter of an alien mother, who is alive at the death of an intestate brother, cannot take his real estate by descent. We again refer to it, to show the similarity in principle and effect which is held to exist between the legislation of England and New York upon this point, and also the discussion and disposition of another incidental question which may very readily occur to the student, as well as arise in practice.

It is stated as a rule by Chancellor Kent, that "if a citizen dies, and his next heir be an alien who cannot take, the alien cannot interrupt the descent to others, and the inheritance descends to the next of kin who is competent to take, in like manner, as if no such alien had ever existed."

2 Kent, 56.

This is a doctrine qualifiedly sustained by the authorities cited in the work referred to, and often applied in practice.

After quoting this doctrine from Chancellor Kent, it is further remarked, in the case under review, as follows:

"Therefore, it is argued, that the plaintiff may well be the heir of Robert Swanton, and capable of inheriting in the lifetime of her mother, who, being an alien, cannot interrupt the course of descent. The difficulty of this position is, that if the name of the mother be stricken from the plaintiff's genealogical chart, it will not appear that she has any connection with Robert Swanton, whose heir she claims to be. The cases to which the doctrine referred to in the commentaries applies, are those in which the claimant does not make title through the alien, but where she can deduce her pedigree from the person dying seised, by leaving out or passing by the alien."

Again, it is remarked, that "all the cases decided in this country, where an alien would have taken the estate but for his alienage and in which a more remote heir was preferred, were cases of the same character, the successful claimant making out his descent independent of, and not through, the alien."

Several of the leading cases are then cited, most of which are hereinbefore noticed.

The argument of the plaintiff is thus conclusively answered by Judge Denio: "Upon the plaintiff's theory, the statute under consideration would have been quite unnecessary; for if she can be allowed to strike out her alien ancestors, intervening between the person dying seised and herself, whether living or dead, and make title to the land of the person so dying seised, as his immediate heir, the defect of heritable

blood in such ancestors would be a matter of no moment. Independently, therefore, of direct authority, we are of opinion that the plaintiff is not aided by the statute referred to. It does not improve the situation of a person who, aside from all questions as to alienage, would not have been the heir; and the plaintiff cannot be the heir of Robert Swanton during the life of her mother."

We have quoted from the foregoing case, because it presents an unanswerable argument against the efforts which seem to have been so frequently and persistently made to apply the English act in question, and the like acts in this country, as well to alien ancestors living as to alien ancestors deceased. Without regard to the authority of the court, the views there presented are so conclusive in principle and propriety, that they should be regarded as settling the vexed question there decided, as long as the statute remains in force.

The word *ancestor*, as used in the enabling act, 11 and 12 Wm. III, chapter 6, and as used in like statutes in this country, has been made the subject of much discussion, whether it should be construed to mean lineal ancestors only, or whether collateral ancestors were also intended. The New York statute is held to embrace both lineal and collateral ancestors.

McCarthy v. Marsh, 5 N. Y. 263.

It is true, that the lexicographers generally define the word *ancestor*, as one who has preceded another in a direct line of ascent, or as one from whom another traces his descent. But the case here cited construes it to denote any one from whom another may derive an estate by inheritance. Using it in that way, a person may have collateral ancestors as well as lineal. They are only ancestors of the estate, not of the blood. The phraseology of the English act is such as to leave no doubt it was so intended by the law makers, for it specifies ancestors "*lineal or collateral*."

The words of the English statute are "That all and every person or persons, being the king's natural born subject or

subjects, within any of the king's realms or dominions, shall and may hereafter lawfully inherit and be inheritable, as heir or heirs to any honors, manors, lands, tenements or hereditaments, and make their pedigrees and titles by descent from any of their ancestors, lineal or collateral, although the father and mother, or fathers or mothers, or other ancestor of such person or persons, by, from, through, or under whom he, she or they shall or may make or derive their title or pedigree, were or was, or is or are, or shall be born out of the king's allegiance, and out of his majesty's realms and dominions, as freely, fully and effectually to all intents and purposes, as if such father or mother, or fathers or mothers, or other ancestor or ancestors, by, from, through or under whom he, she, or they shall or may make or derive their title or pedigree, had been naturalized or natural born subjects."

It will be seen that there is no doubt of the intention of that statute to include collateral ancestors equally with lineal. The word *ancestor* is there applied to the estate that is to descend, and not to the source from whence the heir derived his life, or, in the language of the feudal law, his blood.

It is reasonable to presume that those States which have adopted a like provision into their statutes, have done so with like intent, although they may have not so clearly expressed their intention, as it is expressed in the statute from which they have patterned.

Otherwise, they have but half remedied the evil which that statute was designed to remove. Persons capacitated to hold lands, and to take by descent, were prevented from inheriting, because they must take the title, if at all, through some other person, who, if alive and a citizen, would inherit, but who was dead at the time of the death of the person last seised, and was an alien. That alien medium was, at common law, an obstacle to the succession of the citizen heir. The statute in question was designed to remove such obstacle whenever it occurred. It will be readily perceived that it would be immaterial whether this alien medium, which thus interrupted the inheritance, was the ancestor in blood or only

in estate, or both, to the person otherwise entitled to inherit. The point sought to be accomplished, was to remove the obstacle and let the citizen heir take the estate. It would be absurd to so construe the statute that he could not inherit, unless the alien ancestor, in his way, was his ancestor in blood, as well as in estate.

We have found but one case in this country which undertakes to hold that the *ancestor* must be the ancestor in blood as well as in estate, in order to bring the case within the statute.

Banks v. Walker, 8 Barb. Ch. R. 438.

The chancellor conceded a different construction to the English statute. But he evidently failed to fully comprehend the purpose and object of the statute he was required to pass upon, as well as the English act from which that was taken.

This decision of the chancellor stands alone, and must be regarded as overruled by the case in the court of appeals before cited.

In the case referred to, *McCarthy v. Marsh*, 5 N. Y. 274, Judge Ruggles, in delivering the opinion of the court, said: "The defendants, however, insist that no others than lineal progenitors of the plaintiff are embraced within the meaning of the word ancestor, as used in this section; and therefore, that it does not remove the impediment arising from the alienism of the father and grandfather of Denis McCarthy, of New York, who died seised of the estate, and from whom the plaintiff claims to inherit. But I have no difficulty in coming to the conclusion that the word 'ancestors' in the statute was used in a more comprehensive sense, and that the act was intended to remove the impediment of alienism in the transmission of an inheritance in regard to all the deceased individuals through whom the blood of the last owner of the land is to be traced to the heirs. The revisors, in their note to this section, say, 'the provision was intended to change a very harsh rule of the existing law, by which a person not an alien himself, may sometimes be de-

barred from inheriting.' If we were to adopt the defendants' construction of the act, the mischief of the former law would be very imperfectly remedied. The exclusion of aliens from holding lands is founded on manifest reasons of public policy and safety. But the exclusion of a natural born or naturalized citizen from taking lands by inheritance, merely because the degree of his consanguinity to the last owner is to be ascertained by tracing his pedigree through deceased aliens, is and always was an absurdity, founded only on a feudal fiction, and not on any sound principle of public policy. Its primary object probably was to enrich the crown by escheats. To exclude a claimant on the ground that his collateral kindred were aliens, is no less absurd than to debar him because his lineal ancestors were in that condition. In England the common law rule was abolished in favor of natural born citizens one hundred and fifty years ago by the statute of 11 and 12 Wm. III, chapter 6, and it applied expressly to all ancestors, lineal and collateral.

"Our statute, although in fewer words, is more comprehensive than the English act. It enables naturalized as well as natural-born citizens to inherit through alien ancestors; and if there be any such things known in the law as collateral ancestors, they are embraced within its operation, because the claimant is not to be precluded by the alienism of 'any ancestors,' and this means ancestors of any kind or description. The word is used in an unqualified and unlimited sense, and therefore in its most comprehensive sense."

The opinion here quoted clearly states the origin of the statute in question, as well as its object and the principle and manner of its operation. It seems hardly possible that any lawyer or court should, after properly understanding the decision in that case, and the opinion upon which it was founded, entertain the notion that the term *ancestors* used in the statute only means lineal ancestors and does not include collateral also.

It is sometimes an expression of the books that an alien lacks inheritable blood. It is an objectionable phrase, for

the reason that it may beget an erroneous impression. Alienism is an obstacle to inheritance which arises from the place, and not from the regularity of birth. It is, in that respect, unlike illegitimacy. To attribute the defect to a matter of blood is therefore erroneous.

The alien lacks the right to inherit merely because he is not a citizen or a subject of the government where the land lies. The inheritance itself is made up of a right to the possession and use of certain land, which right is derived from a grant or contract of the State. By the laws of the State, no person not a citizen, can be a party to such a contract, where the common law rule has not been changed by statute. Hence the alien fails to inherit merely from lack of legal capacity to become a party to such contract. And the citizen encounters the same difficulty when he finds that his right of succession must come from the intestate, not directly or immediately, but indirectly and mediately through some alien relative deceased before the intestate. That was one of the impediments to inheritance sometimes found between the intestate stock of descent and the person otherwise entitled to the succession. The statute in question was intended to remove that impediment. Wherever such a statute is in force, a person who, by the laws of the State where the land lies, has a right to succeed to the estate on the death intestate of the tenant, cannot be interrupted in his succession by the fact that the right has come mediately to him through some person before deceased who was an alien.

In those States which make no distinction between citizens and aliens in regard to the right of inheritance, questions of alienism cannot arise.

Under the common law, as it prevailed in England and in this country until about the beginning of the nineteenth century, none but natural born subjects could take land by descent. Neither alien nor denizen enjoyed the right.

Crabb's History of English Law, 572.

SECTION III.

EQUITABLE CONVERSION; ITS EFFECT UPON THE RIGHTS OF
THE HEIR.

The heir may be defeated in his succession, even when the ancestor dies intestate and seised of an estate of inheritance, in case the intestate had made a valid contract to sell. Equity then intervenes and holds that the estate is vested, in equity, in the vendee; and being so vested, it is to be treated in the law of descents the same as though it was legally vested in him. The vendor, after making such contract of sale, is no longer in such relation to the estate as to constitute him the stock of descent should he die intestate. While the vendee, in case of his death intestate, would be regarded in the law as the root or stock of descent.

The law was so held in *Champion v. Brown*, 6 Johns. Ch. R. 398.

The rule is thus stated in that case by the Chancellor: "The title in law never passed out of the vendors, though in equity, by virtue of the agreement to sell, the estate was in the vendee, and was in him transmissible by descent, and devisable by will."

The law of the case, in that respect, is stated in the head notes as follows: "Where there is a contract for the purchase of land, it descends, in equity, to the heirs of the vendee as real estate; and they may call on the executors or administrators to discharge the contract out of the personal estate of the vendee, so as to enable the heirs to demand a conveyance from the vendee."

In *Griffith v. Beecher*, 10 Barb. 432, it was decided, that "an interest in a contract for the purchase of land is real estate, and descends to the heirs of the purchaser."

In a more recent case, in New York, it was held, that, "where a contract is entered into for the conveyance of land on the payment of the purchase money, the estate vests, in equity, in the vendee, and the vendor retains the legal title as a mere lien or security for the unpaid purchase money.

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of the vendor, his interest in the contract is personal property, and goes to his personal representatives. It passes by assignment, with or without seal, and by mortgage, and it may be sold as personal property by the executor or administrator."

Moore v. Burrows, 34 Barb. 173.

The same doctrine was held in *Adams v. Green*, id. 176. The principle upon which this class of decisions is founded is stated, in 1 Fonblanque's Equity, 419: "And as this is to enforce the execution of agreements, and regards substance only, and not forms and circumstances, it therefore looks upon things agreed to be done as actually performed, as money covenanted to be laid out in land, to be in fact real estate, which shall descend to the heir."

In 2 Story's Equity Jurisprudence, § 790, the author, speaking of executory contracts of sale of lands, says, that courts of equity "treat them, for most purposes, precisely as if they had been specifically executed. Thus, if a man has entered into a valid contract for the purchase of land, he is treated in equity as the equitable owner of the land; and the vendor is treated as the owner of the money. The purchaser may devise it as land, even before the conveyance is made; and it passes by descent to his heir as land."

As a consequence of this rule, either party may enforce the fulfillment of a contract of sale against the other party and against his representatives. A principal ground urged in favor of the rule is the fact, that either party to a contract of sale of land may, by the aid of equity, have it enforced against the other party. And the representatives of each have the like remedy against the opposite party or his representative. After stating the mutual remedies of the respective parties and their representatives against each other, Judge Story remarks as follows:

"And the purchase money is treated as the personal estate of the vendor, and goes, as such, to his personal representatives. In like manner, land, artided or devised to be sold and turned into money, is reputed as money; and money,

articled or bequeathed to be invested in land, has, in equity, many of the qualities of real estate; and is descendible and devisable as such, according to the rules of inheritance in other cases." § 790.

One of the judges, in *Moore v. Burrows*, dissented to this rule; but, regarded as a matter of authority, there is no reason to question it.

The authorities to sustain the rule are numerous. They can be found cited in note 420 to 1 Fonblanque's Equity, before referred to, and in note 3 to the section of Story's Equity Jurisprudence, last above cited.

The doctrine of equitable conversion is fully indorsed by the supreme court of the United States, in *Craig v. Leslie*, 3 Wheat. 563. It is declared, in the language of an English case, that "nothing is better established than this principle, that money directed to be employed in the purchase of land, and land directed to be sold and turned into money, are to be considered as that species of property into which they are directed to be converted, and this, in whatever manner the direction is given." It is added: "The owner of the fund or the contracting parties, may make land money, or money land."

The ground upon which the doctrine is founded is then thus stated: "The principle upon which the whole of this doctrine is founded is, that a court of equity, regarding substance and not the mere forms and circumstances of agreements and other instruments, considers things directed or agreed to be done, as having been actually performed where nothing has intervened which ought to prevent a performance. This qualification of the more concise and general rule, that equity considers that to be done which is agreed to be done, will comprehend the cases which come under this head of equity."

See also, *Cruse v. Barley*, 8 P. Williams, 22, note 1.

The more recent cases are alike uniform in holding and applying the doctrine of conversion. Indeed, there is no dispute in regard to the rule itself. The chief, if not the

only difficulties, touching the subject, is, in applying the rule. These difficulties arise from the different facts and circumstances which distinguish the various cases.

There are certain general principles common to all the cases.

1. The intention of the donor, to be ascertained by his directions and instructions, must control the question of conversion.

2. It is immaterial in what manner or form those instructions are given, whether by will, by deed, by marriage settlement or otherwise.

Collins v. Champ's Heirs, 15 B. Mon. (Ky.) 118

3. The conversion from real to personal or from personal to real property, is regarded as having taken place from the time prescribed by the donor. If the directions are given by will, and no particular time for the conversion is named, it is to be treated as taking place on the death of the testator.

In the case of *Irish v. Husted*, 39 Barb. 411, the conversion of real estate was effected by will. The testator not only directed his executors to sell and convert his land into money for its more ready distribution, but he expressly declared that it should be treated as personal property from the time of his decease. This direction was held to be controlling. In speaking of the testator's instructions, it was said by the court: "Those terms are too positive and broad for this court to put them aside, and consider the bequests of the several quarters of the proceeds of the sale of his real estate as realty."

There is a case in Massachusetts, holding that the mere conversion of land into money, either by the direction of the testator, or by operation of law, for its better investment, "or for any other purpose consistent with the design and purpose of the ultimate destination to which the real estate was appropriated, there the money is substituted for, and stands in the place of the devised real estate, and shall go to the same persons and in the same proportions, and vest in possession and enjoyment at the same times and upon the

same contingencies which would have affected the real estate had it remained specifically in real estate."

Holland v. Cruft, 3 Gray, 181.

The rule there stated was applied, however, to the provisions of the will only. As to the question of descent, it is further said: "But in the present case the real estate was converted into personal during the subsistence of the particular estate, so that at the moment of the decease of the tenant for life, no real interest remained to descend to the heir; and the will took effect upon the proceeds immediately, as it would have done upon the real estate, had it specifically remained."

Id. 182.

In *Lewis v. Smith*, 9 N. Y. 510, it was held that "the land had been sold by the testator in his life-time, and his interest at the time of his death was the right to the money due upon the contracts, and was personal estate."

It has been decided in Kentucky, that money directed to be vested in the purchase of land, and land directed to be sold and converted into money, must be considered as "that species of property into which they are directed to be converted."

Collins v. Champ's heirs, 15 B. Mon. 118.

In Indiana, where the owner of land had made a contract of sale, and then died intestate, the purchase money remaining unpaid was treated as personal property.

Henson v. Ott, 7 Ind. 512.

A like rule was proclaimed in *Bramhall v. Lewis*, 14 N. Y. 47, as follows: "There was a positive direction to convert the lands into money; that makes the whole estate in effect personal from the death of the testator, and when once converted into personal estate it was to remain in the hands of the executors; they were to invest the proceeds of sale on bond and mortgage on real estate and keep it so invested."

In *Fowler v. Depau*, 26 Barb. 239, it seems to be held that a mere power to sell real estate does not convert it into realty. It is said :

“The will merely authorizes and empowers the executors to sell the real estate. It does not direct or order them to do so; nor does it authorize the sale for any purpose of distribution, or to carry out any trust. It gives a mere power, to be exercised only if found convenient. It is not imperative, and is not a power in trust; the beneficiaries are the same, whether the estate remains real or be converted into personal; no beneficiary can compel a sale against the judgment or will of the executors. To cause a conversion from real to personal, the will should decisively and definitively fix upon the land the quality of money.”

Where a testator authorized and empowered his executors to sell and convert into money all his estate, real and personal, and the purposes of the will seemed to indicate the intention of the testator to have the real estate so converted because those purposes were incapable of execution without it, it was held that it must be regarded as having been converted into money.

Phelps v. Phelps, 26 Barb. 121.

The doctrine of equitable conversion as held in the foregoing authorities has been generally sanctioned in other cases.

Parkinson's Appeal, 32 Penn. St. R. 455; *Harcum v. Hudnall*, 14 Gratt. 369; *Mathis v. Griffin*, 8 Rich. Eq. R. 79; *Leiper's Appeal*, 35 Penn. St. R. 420; *High v. Worley*, 33 Ala. 196; *Barnett v. Barnett*, 1 Met. (Ky.) 254; *Ross v. Drake*, 37 Penn. St. R. 373; *Wood v. Reeves*, 5 James' Eq. 271; *Hocker v. Gentry*, 3 Met. (Ky.) 463; *Scudder v. Vanassdale*, 2 Beaseley, 109; *Anewalt's Appeal*, 43 Penn. St. R. 414; *Johnson v. Bennett*, 39 Barb. 237; *Chew v. Nicklin*, 45 Penn. St. R. 84; *Edwards' Appeal*, 47 id. 144; *Conly v. Kincaird*, 1 Wina. (N. C.) No. 2, Eq. 44.

SECTION IV.

A DEVISE. WHEN IT DEFEATS THE HEIR AND WHEN NOT.

It is not within the design of this work to treat of the subject of devises, any further than to notice a single point. The heir may be defeated by a devise of the ancestor. But the point here to be examined is this, that the devise must bestow the land differently from what the devisee would take by descent. If the devise give to the heir an estate in quantity or quality different from what he would take by descent, it interrupts the rights by descent. But when it assumes to give precisely what the person named as devisee would take by inheritance, then the devise is void, and the person named as devisee takes the estate by descent.

The rule itself has never been disputed. But it has sometimes been a question whether a devise, in a particular case, was within the rule. And that question must necessarily turn upon the point, whether the devise, giving to it all the effect to which it is entitled, in any way gives either more or less than the person named as devisee, would take by the laws of descent.

The examples of this class of questions in the reported decisions are numerous.

In *Hainsworth v. Pretty*, Cro. C. 833 and 919, there was a devise of certain land to the eldest son of the devisor; with a provision, that the said eldest son should pay £20 to certain younger children named, which the testator bequeathed to them in the same will. There was a further provision in the will, that if the eldest son refused to pay the said sum, he should not have the estate, but the other children should have it. The eldest son failed to pay the £20. The question was, whether the estate went to him or to the younger children. If the devise to the eldest son was to be regarded as a devise in fee, it was considered void, because it bestowed precisely what he would have taken by descent. If the provision as to paying the £20 was regarded as a limitation of the devise, then it did not bestow the fee, and was valid as a

devise; and the land went to the younger children on failure of the eldest son to pay the £20. The court decided, that the condition of paying the £20 operated as a limitation, and the younger children took the land on default of payment.

The language of the devise in that case very clearly made the payment of the £20 a condition precedent to the devise to the oldest son. The testator devised to his oldest son all his lands "*upon condition* he should pay to his other children the said sums appointed unto them according to the intent of his will; and if he refused the payment of the said sum or sums of money, that then neither he nor his heirs shall have or enjoy the said lands, any devise, title, descent, or interest to the contrary notwithstanding; but that the said sons and daughters should have it to them and his heirs."

There was, as the court held, an immediate devise to the younger children, if the eldest son did not perform the condition.

In the case of *Hurst v. Earl of Winchelsea*, 2 Burr. 879, a son was held to take the estate of his mother by descent and not by her will. She devised all her estate to him, subject to the payment of her debts. He died intestate. The question was, whether his heirs on the part of his father, or his heirs on the part of his mother, succeeded him in the estate. The maternal heir was held to be the successor.

Emerson v. Inchbird, 1 Ld. Raym. 728, is another example of the operation of the rule. There was a devise of certain lands by the father to the son, but chargeable "with an annuity or rent-charge," payable to the defendant's mother. The action was debt, against the son as heir to his father upon a bond of the father. The question made by the pleadings was, whether the son had land by descent. And that question depended upon whether the devise was operative, or whether the son took by descent, on the ground that the devise did not change the course of descent. The son was held to take by descent. The court held, "that the messuages descended to the defendant, and were assets." The distinction was thus stated by Holt, Ch. J.:

"For the difference is, where the devise makes an alteration of the limitation of the estate, from that which the law would make by descent; and where the devise conveys the same estate, as the law would make by descent; but charges it with incumbrances. In the former case, the heir takes by purchase; in the latter, by descent."

That decision cannot be sustained upon principle, unless the annuity or rent-charge is also rejected. If the devise was void, clearly no incumbrance was imposed on the premises by the devise.

The question as to the annuity or rent-charge does not appear to have been considered.

Clerk v. Smith, 1 Salk. 241, is a similar case. The testator devised lands to his daughter's son, who was his heir, upon condition that he should pay £200 to such person out of the said lands as the wife of the testator should appoint by her deed. The grandson entered and died seised and intestate. The wife of the testator made no appointment. The grandson left an heir on the part of his mother, and also an heir on the paternal side. Which had the title by descent, depended upon whether the grandson took by descent or by devise, of his grandfather. "It was adjudged, that he was in by descent, and not by purchase, for the devise gives him the same estate the law would have given him, under a possibility of being charged, which never happened; by consequence, as the grandson took it as heir *a parte materna*, he shall transmit it in the same manner to his heirs *a parte materna*."

The same question occurs here as in the previous case. Taking by descent, how was it possible that the devise could impose a charge upon the grandson?

In that case, two of the judges are reported to have denied *Gilpin's case*, Cro. C. 161.

That, however, was not a case like the one then before the court, but nearly resembled *Hainsworth v. Pretty*.

In *Gilpin's case*, the defendant was sued for a debt of his father, and pleaded *riens per descent*. Issue was joined

thereon, and the jury found that the father had devised the land to the son "upon condition that he should pay his debts within a year, and, if he failed, that his executors should sell the land and pay his debts." The son did not pay the debts, and the executors sold the lands and paid them. The son was held to have had the land by purchase and not by descent. The more proper ruling would have been, that he did not take at all, because he failed to fulfill the condition.

Lord Holt is reported, in 6 Mod. 241, to have said: "If devise be to the heir at law, paying such and such legacies, etc., and for default thereof, remainder over, the heir, till default, is in by descent, and the other's interest is by way of executory devise."

In all the cases where the person named as devisee is held to be in by descent, he is so in because the devise is void. It is, therefore, absurd to say that as heir at law and taking by descent, the will can impose any obligations on the heir, or operate as an executory devise. The devise is either void or operative. The devisee named is either in under the will, or he is in by descent. There is no middle ground between the two. When it is once decided that a person takes by descent, it is absurd to say that his rights to the estate can be, in any way, affected by the devise.

This class of cases is cited in Co. Litt. 12, b, Hargrave's note, 63.

They were rendered of very little, if any consequence in England by a statute provision, declaring that when land is devised to an heir, he shall take as devisee and not by descent.

8 and 4 Wm. IV, ch. 106, § 3.

Those decisions are of more value in this country, because the English statute referred to, has not been copied in all the States, if it has in any.

The rule of the common law still prevails in this country. A devise to an heir of precisely what he takes by the laws of descent is void. His title of heir is superior to the devise.

It is said to be the worthier title. The reason why it is, is obvious. The heir is a nominee of the grant, and was once regarded as having a right of property therein, even while his ancestor was living. Formerly, the ancestor could not defeat his succession by alienation or devise. Subjecting the heir to be deprived of his right by the devise of the ancestor, was an encroachment upon the rights of the heir. Consequently no devise could have any effect unless it interfered with the rights of succession. When the heir took by descent, he merely took his own; when by devise, he took what, but for the will, was another's.

There is a case in Massachusetts, where a devise was held inoperative on the ground that it undertook to convey precisely what the person named as devisee took by descent.

Ellis v. Page, 7 Cush. 161.

The devise in that case was, in terms, to the heirs at law of the testator. The question was, whether the land could be sold to pay specific legacies. If the heirs took by the will, the land could not be sold for that purpose; if by descent, it could be. That result depended upon a provision in the statutes of the State. It was decided that the land could be sold to pay the legacies.

According to that decision, the provision of the statute subjected the land to the will, although the heir took by descent. If he had taken under the will, the land could not have been sold to pay legacies provided in the will. Thus, the heir was made the more subordinate to the will, than though he had taken the land under the will. This result is attributed to the statute.

The court adopted Chancellor Kent's test. "Strike out the particular devise to the heir, and if, without that, he would take by descent exactly the same estate which the devise purports to give him, he is in by descent, and not by purchase." 4 Kent, 506, 507.

The same rule was held to prevail in Maryland.

Gilpin v. Hollingsworth, 3 Md. 190.

The right which the heir takes by descent, is very strongly sanctioned in Georgia.

Wright v. Hicks, 12 Geo. 155.

The right of the heir at law cannot be interrupted except by an express devise, or by a devise which, by implication, clearly gives the estate to some other person.

Doe v. Sanjus, 3 Ind. 444: *McIntire v. Cross*, id. 444.

The common law rule prevails in New York.

Buckley v. Buckley, 11 Barb. 43.

And in Tennessee the same rule was held to control.

Hoover v. Gregory, 10 Yerg. 444.

SECTION V.

FORFEITURE FOR CRIME. ITS EFFECTS UPON THE LAWS OF INHERITANCE.

Under the laws of England, when sentence of death was pronounced on a person convicted of high treason, of murder, or of abetting, procuring or counseling the same, he forfeited all the estates held by him. The convict was not only deprived of his estates himself, but his heirs suffered in like manner. In the language of the old law writers, "the blood of the person attainted is so corrupted as to be rendered no longer inheritable."

2 Bl. Com. 251: 1 Cruise Dig. 72: *Williams on Real Prop.* 326, 415: *Smith on Real and Personal Prop.* 326, 415.

In cases of high treason, the land reverts to the crown, even when there is an intermediate lord between the crown and the traitor. But in other crimes, where the land is held of an intermediate lord, the land reverts to him, subject only to the possession of the crown for a year and a day, and waste. In cases where the land is held immediately of the crown, it reverts to the crown absolutely, upon the forfeiture.

Blackstone characterizes the operation as follows:

"The doctrine of escheat upon attainder, taken simply, is this: that the blood of the tenant, by the commission of any felony, is corrupted and stained, and the original donation of the feud is thereby determined, it being always granted to the vassal on the implied condition of *dum bene se gesserit*. Upon the thorough demonstration of which guilt, by legal attainder, the feudal covenant and mutual bond of fealty are held to be broken, the estate instantly falls back from the offender to the lord of the fee, and the inheritable quality of his blood is extinguished and blotted out forever."

2 Bl. Com. 252.

The result may be stated in simple language as follows: The tenant of an estate in fee, upon conviction of the felony, and sentence thereupon, becomes civilly dead. He has no longer capacity to be a party to the grant of the estate under which he held. The grant ceases to exist, for the want of a party thereto. There is nothing left to descend to his heirs.

Chancellor Kent expresses the result in this way:

"The law of forfeiture went, indeed, upon feudal principles, beyond the law of escheat. It extinguished and blotted out forever all the inheritable quality of the vassal's blood, so that the sons could not inherit, either to him, or to any ancestor, through their attainted father. He was rendered incapable, not only of inheriting or transmitting his own property by descent, but he obstructed the descent of lands to his posterity, in all cases in which they were obliged to derive their title through him from any more remote ancestor."

4 Kent, 426.

The proposition there stated is correct enough, but it is involved more in a maze than it need be. The vassal, by the conviction of crime, was incapacitated to be a party to a contract of lease. The contract of lease, therefore, ceased to exist for the want of a party of the second part. Of course, there was nothing left to which the heirs of the convict could succeed.

It is not easy to see how the result differs from the escheat, except that an escheat happens, because the tenant dies intestate, leaving no heirs. In such case, the grant or lease ceases to exist, for the want of a party of the second part thereto. In the one case, the tenant no longer has the required capacity of a tenant, and the lease expires in consequence thereof; and in the other, he dies and leaves no one who can succeed him as an heir, according to the terms of the contract of grant or lease. The State, as the reversioner, becomes entitled to the possession, the same as of all other ungranted lands.

This class of forfeitures was feudal in its origin and character. Certain crimes were made a breach of the feudal contract of lease, that was made to operate upon conviction and attainder, as terminating the contract. Descent was interrupted, simply because there was nothing to descend.

It was, in effect, a condition of tenure of all the land in the kingdom, held by a subject, that conviction of certain crimes and attainder, or the conviction of any crime, which might be prescribed to work a forfeiture, should terminate the compact under which the land was held; and the immediate reversioner should then again have the right of possession.

It is difficult to perceive how the line of descent can, in that way, be interrupted in this country, as our governments, both State and national, are now organized. In the Constitution of the United States it is provided that no State shall pass any bill of attainder. Art. 1, sec. 1. And congress is prohibited to make an attainder of treason, work corruption of blood, or forfeiture, except during the life of the person attainted. Art. 3, sec. 3, sub. 2.

The language of this provision is, "The congress shall have power to declare the punishment of treason; but no attainder of treason shall work corruption of blood, or forfeiture, except during the life of the person attainted."

The extreme rigor of the common law, in regard to forfeitures, had been modified in England, at one time, before

the separation of the colonies which now constitute a part of the United States.

By an act of parliament in the reign of Queen Anne, forfeiture for treason was limited to the life of the offender.

7 Anne, ch. 22.

That act was partially repealed in the reign of George the Second.

17 George II, ch. 29.

In the next succeeding reign it was wholly repealed.

39 George III, ch. 93.

Forfeiture for the crime of treason was thus left as it was before the modification by the statute of Anne.

In the reign of George the Second there was a statute providing that no attainder, except for high treason, petit treason, murder, or abetting the same, shall extend to the disinheriting any heir, or to the prejudice of any person except the offender during his life.

54 George II, ch. 145.

In cases of extreme forfeiture, the blood of the tenant was said to be attainted or corrupted, and to lose its inheritable quality. That language was extremely figurative; and seems to have been contrived more for sensational and awe-inspiring effect, than for correctness. It might be inferred that the effect was to incapacitate the heir from inheriting. While in truth, the whole effect upon the heir was, that it left no estate in the ancestor for the heir to take. The blood of the tenant lost no inheritable quality. He merely lost his property. He had no estate to pass to his heirs by descent. Neither the personal rights, nor the political status of the heir, suffered directly from the ancestor's crime, or from the punishment inflicted upon him, except that he could not derive by inheritance, through such convicted ancestor, for the obvious reason that the convict lacked the capacity to hold land.

In New York, there is only one crime upon conviction of which the convict forfeits his right to land, and for that the forfeiture is limited to his life.

It is provided, that, "whenever any person shall be outlawed upon a conviction for treason, the judgment thereupon shall produce a forfeiture to the people of this State, during the life-time of such person, and no longer, of every freehold estate in real property, of which such person was seised in his own right, at the time of such treason committed, or at any time thereafter; and of all his goods and chattels."

2 R. S. 656, § 3.

Forfeiture for all other crimes is expressly abolished.

2 R. S. 701, § 22.

The right of succeeding to estates of inheritance cannot therefore be defeated by any crime of the ancestor, in New York. It seems to be so provided in all the States; indeed, as before shown, it is difficult to perceive how it can be otherwise.

"A person sentenced to imprisonment in a State prison for life, shall thereafter be deemed civilly dead." That is the law of New York.

2 R. S. 701.

That is probably the law in all the States.

That civil death takes from the person so sentenced all right to hold property. He cannot take an estate by inheritance, nor hold such estate. But instead of interrupting descent to his heirs, it hastens it. The heirs succeed to his estates, immediately after the sentence is pronounced, as effectually and as absolutely, as though the death had been a natural, instead of a mere civil death. Even a pardon will not restore the property, especially if it has been in the mean time sold and conveyed.

In the matter of Deming and his children, 10 John. R. 232;
Troup v. Wood, 4 John. Ch. R. 248; Platner v. Sherwood,
6 John. Ch. R. 118.

In the case last cited, the subject of forfeitures for crime was elaborately considered; and all the previous authorities upon the subject were cited and explained.

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